LIBRARY
SUPREME COURT, U. S.

FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 852

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,
Attorney for Petitioner.

MIDWEST LAW PRINTING CO., 226 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-2900

INDEX

PAGE

Opinion Below 2

Jurisdictional Statement 2

The Questions Presented 4

Concise Statement of the Case 5

Reasons for Granting the Writ 6

Prior To This Opinion, On Each Occasion A District Court Has Considered The Element Of Federal Taxation In An Action Under This Statute, On Appeal This Has Been Held Error; There Is No Precedent For The Present Opinion 8

The Impact Of This Decision Upon The Administration Of This Statute And Similar Federal Statutes 9

Conclusion 11

Appendix—(Opinion of the United States Court of Appeals for the Seventh Circuit) 1a-6a

List Of Authorities Cited.

Cases:

Allendorf v. E. J. & E. Ry. Co., 8 Ill. 2d 164, 133 N.E. 2d 288 ..... 3, 10

Boston and Maine Railroad v. Talbert, 1 Cir., 360 F. 2d 286 3

Chicago, R. I. & P. R. Co. v. Kinsey, (Okla., 1962) 372 P. 2d 863, 867, 868 8
Cunningham v. Rederiet Vindeggen A. S., 2 Cir., 333 F. 2d 308 8
Friedman v. McHugh, 1 Cir., 168 F. 2d 350 4
Hall v. Chicago & N. W. Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 77 10
McWeeney v. New York, N. H. & H. R. R. Co., 2 Cir., 282 F. 2d 34, cert. den. 364 U.S. 870 ..... 3, 8, 10
Middleton v. Luckenbach Co., 2 Cir., 70 F. 2d 326, 330, cert. den. 293 U.S. 577 7
National Airlines, Inc. v. Stiles, 5 Cir., 268 F. 2d 400, cert. den. 361 U.S. 855 ..... 3, 7, 8, 9
Noel v. United Aircraft Corporation, 3 Cir., 342 F. 2d 232 ..... 3, 6, 8, 9
O'Connor v. United States, 2 Cir., 269 F. 2d 578 8
O'Toole v. United States, 3 Cir., 242 F. 2d 308, 311 9
Payne v. Baltimore & O. R. Co., 6 Cir., 309 F. 2d 546 3
Petition of Marina Mercante Nicaraguense, S. A., 2 Cir., 364 F. 2d 118 ..... 3, 8, 9, 10
Southern Buffalo Ry. Co. v. Ahern, 344 U.S. 367 7
Stokes v. United States, 2 Cir., 144 F. 2d 82 ..... 7, 8
United States v. Pusceda, 5 Cir., 224 F. 2d 5 ..... 3, 8
VanBeeck v. Sabine Towing Co., 300 U.S. 342 ..... 3, 7

Others:

26 C.F.R., sec. 1.61-2(b) 5
28 U.S.C., secs. 1254(1) and 2101(c) 2
26 U.S.C.A., sec. 104 (a)(2) 7
45 U.S.C.A., sec. 51, et seq. 2, 9
46 U.S.C.A., sec. 688 9
46 U.S.C.A., sec. 761, et seq. 2

In The

Supreme Court of the United States

October Term, 1967.

No.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petitioner, Irene Cox, Administratrix of the Estate of Randall S. Cox, Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in this cause.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit appears as an appendix to this Petition and is reported at 379 F. 2d 893. Petitioner's Petition for Rehearing en banc was denied, with three judges of the Court of Appeals voting in favor of the Petition.

JURISDICTIONAL STATEMENT.

Judgment in the Circuit Court of Appeals was entered on May 16, 1967, and the judgment became final on August 28, 1967, when Petitioner's Petition for Rehearing was denied.

The jurisdiction of this Court has several foundations:

(a) It is invoked under sections 1254(1) and 2101(c), Title 28, United States Code, providing for review by this Court by writ of certiorari. The federal rights claimed and involved and the questions presented herein arise under the Death on the High Seas Act. (46 U.S.C.A., sec. 761, et seq.) The question of measure of damages under this Act is in issue; it is the same as in a death action under the Federal Employers' Liability Act. (45 U.S.C.A., sec. 51, et seq.)

(b) This opinion is in direct conflict in principle with other Courts of Appeals on the same subject matter, namely, the measure of damages, which is part of the remedy afforded by the Act. Every other Court of Appeals which has considered this question under this specific statute has not only decided it directly contrary to the

opinion of the Seventh Circuit, but in each instance has reversed any district court who made deductions for possible Federal Income Taxes in computing the measure of damages in an action under the Death on the High Seas Act. Supreme Court Rule 19(1), effective October 2, 1967.

The Second, Third and Fifth Circuits have specifically held that income tax computations must be excluded in computing damages in an action under the Death on the High Seas Act. (*Petition of Marina Mercante Nicaraguense, S. A.*, 2 Cir., 364 F. 2d 118; *Noel* v. *United Aircraft Corporation*, 3 Cir., 359 F. 2d 671; *National Airlines, Inc.* v. *Stiles*, 5 Cir., 268 F. 2d 400; *United States* v. *Puscedu*, 5 Cir., 224 F. 2d 5.)

The measure of damages in a Death on the High Seas action is the same as that in a death action under the Federal Employers' Liability Act. (*VanBeeck* v. *Sabine Towing Co.*, 300 U.S. 342.) This, of course, would likewise apply to the Jones Act.

The First, Second and Sixth Circuits have excluded the element of Federal Income taxation in computing damages in death actions under the Federal Employers' Liability Act. (*Boston and Maine Railroad* v. *Talbert*, 1 Cir., 360 F. 2d 286; *McWeeney* v. *New York, N. H. & H. R. R. Co.*, 2 Cir., 282 F. 2d 34; *Payne* v. *Baltimore & O. R. Co.*, 6 Cir., 309 F. 2d 546.)

Another reason why this Court should take jurisdiction is that there is a direct conflict in principle between this decision and that of the highest State Court of Illinois, which has held that in a death action under the Federal Employers' Liability Act, the question of possible tax liability is not to be considered. (*Allendorf* v. *E. J. & E. Ry. Co.*, 8 Ill. 2d 164, 133 N.E. 2d 288.)

THE QUESTIONS PRESENTED.

1. In an action under the Death on the High Seas Act, can a Court of Appeals properly order a district court to compute damages on the basis of "net income" or "net earnings," making deductions for deceased's possible federal income taxation, notwithstanding that the Act of Congress provides for "fair and just compensation for the pecuniary loss sustained" and notwithstanding that, without exception, other Courts of Appeals of other Circuits have held the measure of damages must be computed without reference to deductions for possible federal income tax liabilities of the decedent? Embraced in this question is: What is the measure of damages in a death action under the Death on the High Seas Act, the Federal Employers' Liability Act, or the Jones Act? Is it "net earnings" or "net income" rather than pecuniary loss?

2. Prior to this decision on each occasion, without exception, that a district court had undertaken to compute the element of federal income taxation, such has been held error by the various Courts of Appeals. Moreover, all other Courts of Appeals to whom the question has been presented in death actions under the Federal Employers' Liability Act, wherein the measure of damages is the same, have uniformly excluded a computation of the deceased's federal income tax liability in awarding damages.(*)

(*) If certiorari is granted, Petitioner would reserve the question whether, in calculating the loss of inheritance, an element of $30,000, the Court of Appeals can properly state that the record does not support an assumption of reduction to present value, (Opinion p. 5a) when the findings of fact of the district court indicate such reduction, as well as assessing costs when such is contra to *Friedman* v. *McHugh*, 1 Cir., 168 F. 2d 350.

CONCISE STATEMENT OF THE CASE.

Petitioner's decedent, a 29 year old Army Captain, lost his life on June 3, 1963, when Respondent's plane, enroute from Seattle, Washington, to Elmendorf Air Force Base, Alaska, crashed into the Pacific Ocean. There was no explanation of the cause.

He left surviving a wife younger than himself and two children, Brian born August 10, 1959, and Alyssa born June 13, 1962. In computing damages, the District Court, the Honorable Michael L. Igoe, made no deduction for income tax decedent would possibly pay on earnings.

The Court of Appeals held that for the twenty year period, commencing with 1979, when his earnings would have been $15,655 to $20,608 per annum had the compensation remained the same, there should be a deduction for income tax, and that the measure of damages was the "net income."(*) (Opin. p. 5a)

(*) Thus, some of the sums which the Court held should be computed on a taxable basis are by law tax free. We refer to the military pay and allowances. (26 C.F.R., sec. 1.61-2(b).) If the present rates or payments and allowances are maintained, this would be $217.98 per month, or $2,615.76 per year. From 1979 until retirement in 1986, there is a period of eight years at $2,615.76 per annum, totaling $20,926.08.

Thus, Petitioner's decedent would not be making $15,655 per year in 1979, but had the present rates of compensation and subsistence failed to escalate, as has been the annual history, his taxable earnings would have been $13,039.24, not $15,655.

REASONS FOR GRANTING THE WRIT.

The measure of damages in an action under the Death on the High Seas Act is "* * * fair and just compensation for the pecuniary loss sustained * * *" This provision has specifically been held not to mean "net earnings" or "net income" as the Seventh Circuit has held.

As recently as 1965, in *Noel v. United Aircraft Corporation,* 3 Cir., 342 F. 2d 232, in an action under the Death on the High Seas Act, a judgment in the sum of $387,387 for the death of a man who earned $418,000 during the five years preceding his death (see p. 238, footnote 5) was reversed on the issue of damages, with the Court of Appeals holding the District Court erred in making the computation. Amongst other errors was the basis of decedent's "net income." Here is what it had to say at p. 240:

> "The trial court in its fact-findings spoke of 'net income' and 'net earnings.' The Death on the High Seas Act allows as damages 'fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought * * *.' 'Pecuniary loss' is the 'reasonable expectation of pecuniary benefits which would have flowed from the continued life of the deceased.' *The S. S. Black Gull,* 90 F. 2d 619 (2d Cir. 1937), cert. den. *Faye* v. *American Diamond Lines,* 302 U.S. 728, 58 S. Ct. 50, 82 L. Ed. 562. 'Pecuniary loss' is not measured in terms of, nor restricted to, 'net income' or 'net earnings.'"

Certainly this 1965 decision of the Third Circuit needs no further elucidation. The Act provides for "pecuniary loss." It does not say "net loss" nor "net earnings."

The measure of damages under this Act is exactly the same as in a death action under the Federal Employers' Liability Act and, of course, the Jones Act. (See: *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 346; *Middleton* v. *Luckenbach Co.*, 2 Cir., 70 F. 2d 326, 330, cert. den. 293 U.S. 577; *National Airlines, Inc.* v. *Stiles*, 5 Cir., 268 F. 2d 400, 404.)

The Death on the High Seas Act is no less a creature of Congress than the Federal Employers' Liability Act or the Jones Act. Each provides the same measure of damages for death. The mandate of this Court is for uniform administration; this Act is not to be administered in a patchwork fashion. (*Southern Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367.)

But there is more. The remedy has been declared to be part and parcel of the Federal Employers' Liability Act. This Act, being a creature of Congress and having the identical remedy, namely, pecuniary loss, must be interpreted so as not to in anywise dilute the remedy afforded by the Act itself.

If the remedy in one court is net earnings with an allowance for income tax payments, while in another court income tax is not considered, there is obviously a gross disparity, not only in the administration of the Act but in the very remedy itself.

Congress, by the specific provisions of the Internal Revenue Code, excludes from gross income the amount of any damages received. (26 U.S.C.A., sec. 104 (a)(2).) If Congress intended to allow the tortfeasor to use an income tax deduction, it must be presumed it would have said so, since this question first arose in 1944, twenty-three years ago. (*Stokes* v. *United States*, 2 Cir., 144 F. 2d 82.)

PRIOR TO THIS OPINION, ON EACH OCCASION A DISTRICT COURT HAS CONSIDERED THE ELEMENT OF FEDERAL TAXATION IN AN ACTION UNDER THIS STATUTE, ON APPEAL THIS HAS BEEN HELD ERROR; THERE IS NO PRECEDENT FOR THE PRESENT OPINION.

In *Noel* v. *United Aircraft Corporation,* 3 Cir., 342 F. 2d 232, a judgment in a much larger sum was reversed for this specific reason. So also in *Petition of Marina Mercante Nicaraguense, S. A.,* 364 F. 2d 118, the deduction was held error.

That the element of income tax has no part in an action under this statute was first adjudicated in 1944 in *Stokes* v. *United States,* (2 C.A.) 144 F. 2d 82, whose virility is demonstrated by *Cunningham* v. *Rederiet Vindeggen A. S.,* 2 Cir., 333 F. 2d 308. See also: *National Airlines, Inc.* v. *Stiles,* 5 Cir., 268 F. 2d 400, cert. den. 361 U.S. 855, and *United States* v. *Puscedu,* 5 Cir., 224 F. 2d 5, where the findings of the Court are footnoted at page 6 of the opinion. These courts refused to consider the income tax element in computing damages.

In the opinion, the Court has cited two authorities. We respectfully submit that neither can support the position of the Court.

O'Connor v. *United States,* 2 Cir., 269 F. 2d 578, an action under Federal Tort Claims Act, was purportedly decided under the law of Oklahoma. Its inapplicability to an action under this statute was pointed out by the same Court which decided *McWeeney* v. *New York, N. H. & H. R. R. Co.,* 2 Cir., 1960, 282 F. 2d 34, 39.

The Oklahoma Supreme Court has itself specifically considered and repudiated the *O'Connor* case in a Fed-

eral Employers' Liability Act case. (See: *Chicago, R. I. & P. R. Co.* v. *Kinsey,* (Okla., 1962) 372 P. 2d 863, 867, 868.)

Petition of Marina Mercante Nicaraguense, S. A., 364 F. 2d 118, the only other opinion referred to by the Court of Appeals below, was a situation where the judgment of the District Court was held erroneous because the District Court deducted income tax in computing damages in the death of tugboat workers, one of whom earned $11,500.

True, there was some comment in the *Nicaraguense* case about "the opposite end of the spectrum." That such was pure dictum is demonstrated by the fact that no Court, even in the case of large earners in actions under this statute, has employed it. (See: *Noel* v. *National Aircraft Corporation,* 3 Cir., 359 F. 2d 671; *National Airlines, Inc.* v. *Stiles,* 5 Cir., 268 F. 2d 400; *O'Toole* v. *United States,* 3 Cir., 242 F. 2d 308, 311. In these cases the earnings per annum ran from $35,000 to $250,000.)

THE IMPACT OF THIS DECISION UPON THE ADMINISTRATION OF THIS STATUTE AND SIMILAR FEDERAL STATUTES.

This Court has stated that the measure of damages is the same under the Death on the High Seas Act as in an action for wrongful death under the Federal Employers' Liability Act. This would naturally be true in Jones Act cases.

Thus, this case presents more than an interpretation of the Death on the High Seas Act, but rather points up the propriety of income tax deduction in the case of two other Federal statutes employed daily in the courts of this country, namely, the Federal Employers' Liability Act (45 U.S.C.A., sec. 51, et seq.) and the Jones Act (46 U.S.C.A., sec. 688).

Although there may be a jury trial in those actions, nonetheless, it has been specifically held that the problem is no different when it arises before a judge sitting without a jury than before a judge and a jury. (*McWeeney* v. *New York, N. H. & H. R. R. Co.*, 2 Cir., 282 F. 2d 34, cert. den. 364 U.S. 870; *Petition of Marina Mercante Nicaraguense, S. A.*, 2 Cir., 364 F. 2d 118.)

Within the very State of Illinois, there will be a variance in the remedies under the Federal Employers' Liability Act, depending upon whether the case is in a State of Federal court. Actions under the Federal Employers' Liability Act and under the Jones Act will exclude the element of income tax, if brought in the State Court of Illinois, under the decisions of its highest court of review in *Hall* v. *Chicago & N. W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77, and *Allendorf* v. *E. J. & E. Ry. Co.*, 8 Ill. 2d 164, 133 N.E. 2d 288, a death action under the Federal Employers' Liability Act. But actions under all these Federal statutes in the district courts of the Seventh Circuit will, under this decision, include the possibility of the potential tax liability of the decedent.

Certainly, nothing is farther from the uniform administration of Federal statutes sought by Congress and dictated by this Court than for one court to afford a different remedy under the same Federal statute than that allowed by another court only three blocks away.

CONCLUSION.

Where, as here, the Court of Appeals has, in considering damages under this Federal statute, departed from the the Act of Congress, as well as the decision of every other Circuit which has considered this specific question, certiorari should be granted to resolve this conflict. But there is more. Since the measure of damages under this Act has been held by this Court to be the same as that in a death action under the Federal Employers' Liability Act, this decision constitutes a departure from cases of other Circuits deciding this specific question. Moreover, it will be sought to be employed in the day in and day out practice of death actions under the Federal Employers' Liability Act in courts throughout the country, unless certiorari is granted here.

We respectfully submit that in the interests of the orderly administration of these Federal Acts, as well as of simple justice, this Court should grant certiorari and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES A. DOOLEY,

Attorney for Petitioner.

APPENDIX

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1966 — APRIL SESSION, 1967

No. 15897

IRENE COX, Administrator of the Estate of RANDALL S. COX, deceased,
Libellant-Appellee,
vs.
NORTHWEST AIRLINES, INC., a Minnesota corporation,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 16, 1967

Before DUFFY, *Senior Circuit Judge*, and CASTLE and SWYGERT, *Circuit Judges*.

CASTLE, *Circuit Judge*. The appellant, Northwest Airlines, Inc., prosecutes this appeal from a judgment entered against it in an admiralty action instituted in the District Court by the libellant-appellee, Irene Cox, administratrix. Libellant sought recovery of damages under the Death on the High Seas Act (46 U.S.C.A. §761 et seq.) for the death of her husband. The action was tried to the court without a jury. The court made and entered findings of fact and conclusions of law, and awarded judgment against the appellant for $329,956.59.

The record discloses that the libellant's decedent, her husband, Randall S. Cox, a Captain in the United States Army, 29 years of age, was a passenger on appellant's Douglas DC-7C airplane N290, flight 293, which crashed in the Pacific Ocean on June 3, 1963 during a flight from McChord Air Force Base, near Seattle, Washington to

Elmendorf, Alaska, at approximately 11:12 A.M. at a point about one hundred sixteen miles west-southwest of Annette Island off the west coast of Canada. The flight had taken off from McChord at about 8:32 A.M. after having been briefed on the weather by both its dispatch office at the Seattle Airport and by a U. S. Air Force weather specialist at McChord, and having followed the usual procedures in preparation for flight. The crew reported by radio at 11:07 A.M. that it had been over Domestic Annette at 11:06 at an altitude of 14,000 feet and requested clearance to climb to 18,000 feet. No reason for the requested change in altitude was given. Domestic Annette is a fix-point at which directional radio bearings are obtained along the air route from McChord to Elmendorf. This was the last known transmission made by the crew of the aircraft. On the following day, June 4, 1963, floating debris was sighted in the Pacific Ocean about 35 nautical miles west of Domestic Annette. Approximately 1,500 pounds of wreckage identified as being from the aircraft, including life vests still encased in their plastic containers and extremely deformed seat frames, was recovered. The bodies of none of the crew or passengers were ever recovered.

The District Court made a number of findings with respect to facts and circumstances concerning the flight. But none of these subsidiary findings afford, or were relied upon by the court as affording, a basis for finding and concluding that any specific conduct attributable to the appellant constituted negligence and was a proximate cause of the crash. The court's conclusion that the negligence of appellant was the proximate cause of decedent's death is predicated upon the court's finding that:

> "[A]s a result of the occurrence Randall S. Cox met his death. The instrumentality which produced the death of Randall S. Cox was under the exclusive control and management of the [appellant] and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and, further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; that the facts herein justify a finding of negligence."

The appellant recognizes that the doctrine of res ipsa loquitur may properly have application in actions involving airline accidents. But the appellant contends that in the instant case it was error to apply that doctrine in resolving the issue of liability because there is substantial proof of the exercise of due care by the appellant and no countervailing evidence of specific negligence or even of unusual circumstances. Appellant urges that evidence of due care on its part precludes any inference of negligence arising from the occurrence in the absence of at least minimal supporting evidence and, therefore, libellant has not sustained the burden of proof requisite to an ultimate finding of negligence and has failed to prove her case by a preponderance of the evidence.

The evidence of due care to which appellant alludes concerns its maintenance records and procedures with respect to the aircraft involved; the qualified and certified status, and the competence, of the operating personnel of the aircraft and of the dispatcher; the safety training received by the crew; and the evidence that the flight was properly dispatched and the weather normal.

There is no evidence as to the cause of the aircraft's crash into the ocean or concerning what happened to affect the operation of the aircraft during the period following 11:07 A.M. and prior to the crash. In the absence of such evidence, the probative value of appellant's general evidence of due care is not of substantial import. Whether due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation of the aircraft can be appraised only in the light of knowledge of what that occurrence was, whether human or mechanical failure or some other incident, and of what if anything was or could have been done about it.

We perceive nothing in appellant's due care evidence which precludes an application of the res ipsa loquitur doctrine or conditions such application upon the libellant's responding with evidence to support some specific negligent act or omission on the part of appellant. Here the cause of the crash which resulted in the death of Randall S. Cox is wholly unexplained. And, as was cogently observed in *Johnson* v. *United States*, 333 U.S. 46, 49:

> "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events."

We are of the opinion that the court properly applied the doctrine of res ipsa loquitur and that its finding of negligence was a permissible one—warranted though not compelled (*Sweeney* v. *Erving,* 228 U.S. 233, 240)— and that the court's conclusion on the issue of appellant's liability is thus supported by the evidence and the application of correct legal criteria. *Haasman* v. *Pacific Alaska Air Express,* D.C.D.Alaska, 100 F. Supp. 1, affirmed *sub nom. Des Marais* v. *Beckman,* 9 Cir., 198 F. 2d 550. *Cf. Blumenthal* v. *United States,* 3 Cir., 306 F. 2d 16, 19; *Trihey* v. *Transocean Air Lines,* 9 Cir., 255 F. 2d 824.

We turn to consideration of appellant's contentions that the District Court erred in its computation of the amounts of certain of the specific elements of damage it included in the $329,956.59 award it made.

Although the awards made on certain of the elements of damage here allowed appear to be generous we cannot say that they are clearly excessive. But this does not preclude us from reviewing the amount allowed for a given element from the standpoint of determining whether the court made an error in the manner of its computation of "a fair and just compensation for the pecuniary loss sustained" by the widow and two minor children of the decedent with respect to an otherwise proper element of damage. And, in this connection, our review of the record, and of the court's findings and computations, convinces us that the court erred in two respects.

The court's computation of the loss of future contributions to the widow and children on the basis of what the court found the decedent's probable future earnings plus retirement income would have been was predicated on probable earnings and income increasing to amounts ranging from $15,655 to $20,608 per annum for the twenty-year period commencing with 1979. No reduction was made for income tax the decedent would have paid on the earnings and income so attributed to this twenty-year period. The deceased's beneficiaries could not logically and reasonably have expected to re-

ceive the money he would have paid in such taxes had he lived. Only the net income would have been available for their support. And there can be no pecuniary loss of income which would not have been available for contribution.

We agree with the rationale of the United States Court of Appeals for the Second Circuit as it appears to have been finally crystallized in Petition of Marina Mercante Nicaraguense, S.A., 364 F. 2d 118, and conclude that the income level here attributed to the twenty-year period commencing with 1979 is such that a reduction for income tax is required to be made from the annual gross income during that period.[1] This is a case where the impact of income tax has a significant and substantial effect in the computation of probable future contributions and may not be ignored. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and probable future earnings, nevertheless, an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before. *O'Connor* v. *United States,* 2 Cir., 269 F. 2d 578, 584.

The damages award also embraces an item of loss of inheritance to the widow predicated upon the court's findings that the deceased, had he lived his life expectancy at age 29.14, would have been survived by his wife and would have left an estate valued at $30,000. The court did not indicate or specify that this figure represented present value, and the record will not support an assumption that it did. The court's failure to discount this amount to its present value was error. A finding of loss based on a future expectancy must be reduced to present value when measuring pecuniary loss in federal wrongful death cases. *Montellier* v. *United States,* D.C. E.D. N.Y., 202 F. Supp. 384, 424.

The appellant advances certain additional contentions with respect to the propriety of the damages awarded. While we are not unimpressed by the merits of these

[1] The decedent's probable income level attributed to the period from his death until the year 1979 is not such that the impact of income tax need be considered.

arguments, they concern neither errors of computation nor the legal permissibility of the element of damage involved. These matters were peculiarly within the province of the trier of the facts, and we refuse to disturb his considered judgment thereon. Suffice it to say that we perceive no basis for a conclusion that the factual findings on which these allowances rest are clearly erroneous. Nor do they result in making the award of damages clearly excessive. We, therefore, will not extend this opinion to discuss these additional contentions.

The judgment of the District Court is affirmed insofar as it adjudicates the issue of the liability of the appellant, Northwest Airlines, Inc., to the libellant, and the cause is remanded to the District Court with directions that the court modify the judgment by reducing the amount of damages awarded therein to conform with the views herein expressed.

A motion of the libellant-appellee to strike from an additional appendix incorporated in appellant's reply brief copies of certain post-trial correspondence addressed to appellant's counsel from an actuarial firm was taken with the case at the time of oral argument. The material to which the motion is addressed purports to review and analyze the computations contained in the District Court's findings and to supply further actuarial computations. The motion to strike is granted. An attempt to so supply matter dehors the record is improper.

In view of the disposition we have made of the appeal it is ordered that no costs on appeal be allowed to the libellant-appellee and that one-third of the appellant's costs on appeal be taxed and allowed against the libellant-appellee.

AFFIRMED IN PART AND
REMANDED WITH DIRECTIONS
TO MODIFY DAMAGES AWARDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 26 1967
JOHN F. DAVIS, CLERK

No. 852

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OWEN RALL
IRVING G. SWENSON
JOHN W. MCCULLOUGH
135 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Respondent

PETERSON, LOWRY, RALL, BARBER & ROSS
135 South LaSalle Street
Chicago, Illinois 60603
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

Question Presented 1

Statute Involved 2

Statement of the Case 2

Reasons for Denying the Writ 3

CITATIONS

Cases

Allendorf v. Elgin J. & E. Ry. Co., 8 Ill. 2d 164, 133 N.E. 2d 288 (1956) 10

DeVito v. United Airlines, 98 F.Supp. 88 (E.D. N.Y. 1951) 7

Dice v. Akron, C. & Y. R. Co., 342 U.S. 359 (1951) 9

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) .. 9

Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) 10

LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965) cert. den., 382 U.S. 878 (1965) 5, 7

Noel v. United Aircraft Corp., 219 F.Supp. 556 (D.C. Dela. 1963) 6

Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964) 5, 6

Noel v. United Aircraft Corp., 359 F.2d 671 (3d Cir. 1966) 6

Payne v. Baltimore & O. R. Co., 309 F.2d 546 (6th Cir. 1962) 8

Petition of Marina Mercante Nicaraguense, S.A. 364 F.2d 118 (2d Cir. 1966) cert. den. 386 U.S. 918 (1967) reh. den. 17 L.ed. 2d 803 (1967) 4, 5

PAGE

Petition of Midwest Towing Co., 203 F.Supp. 727 (E.D. Ill. 1962), affirmed as Midwest Towing Co. v. Richardson, 317 F.2d 270 (7th Cir. 1963) 7

United States v. Puscedu, 224 F.2d 5 (5th Cir. 1955) 8

STATUTES

Death on the High Seas Act, 46 U.S.C. §762 2

Federal Employers' Liability Act, 45 U.S.C. §51 et seq. 8, 9

Jones Act, 46 U.S.C. §688 ..... 7, 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 852

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Did the Court of Appeals in this case properly require consideration of evidence concerning the impact of income taxes on probable future contributions in arriving at the pecuniary loss sustained by the survivors of the decedent, Randall S. Cox, in conformity with the appropriate measure of damages under the Death on the High Seas Act?

STATUTE INVOLVED

The pertinent provision of the Death on the High Seas Act is § 2, 46 U.S.C. § 762, and is as follows:

"§ 762 Amount and apportionment of recovery.

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. (March 30, 1920, c. 111, § 2, 4 Stat. 537)."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is misleading when it asserts that "The Court of Appeals held that . . . the measure of damages was the 'net income.'" (Pet. 5) The Opinion of the Court of Appeals clearly states that it was determining "'a fair and just compensation for the pecuniary loss sustained' by the widow and two minor children of the decedent. . . ." (Pet., p. 5a). Indeed, although the words "net income" happened to be employed by the Court of Appeals—and are seized upon by Petitioner to suggest that the Court did not comprehend the measure of damages under the Death on the High Seas Act—when this phrase is read in context, it is clear that the Court adhered to the statutory standard of "pecuniary loss". Thus, a complete statement should include the full reasoning of the Court of Appeals as follows:

> "No reduction was made [by the District Court in the case at bar] for income tax the decedent would have paid on the earnings and income so attributed to this twenty-year period [when his income would have ranged between $15,655 to $20,608 per year].

> The deceased's beneficiaries could not logically and reasonably have expected to receive the money he would have paid in such taxes had he lived. Only the net income would have been available for their support. And there can be no pecuniary loss of income which would not have been available for contribution." (Pet., pp. 4a-5a).

Petitioner requested a rehearing and rehearing *en banc* on the question of income tax deduction which was denied by the Court of Appeals sitting *en banc*.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW PROPERLY REQUIRED CONSIDERATION OF THE IMPACT OF INCOME TAXES ON PROBABLE FUTURE CONTRIBUTIONS IN APPLYING THE APPROPRIATE MEASURE OF DAMAGES UNDER THE DEATH ON THE HIGH SEAS ACT.

The income tax issue in the case at bar is commonplace and the decision of the Court of Appeals to deny rehearing on the point was justified. The question is whether there are certain wrongful death actions where the impact of income taxes on the prospective future earnings of the deceased is great enough to justify their consideration in arriving at probable future contributions. Estimated income taxes paid by a decedent are evidentiary matters which may be weighed in determining what contributions might have been made to his survivors and are, thus, comparable to his life expectancy, earning power, past contributions, the age of his dependents, his prospects of advancement and promotion, loss of services to the spouse, his sobriety and industry, habits of saving and similar considerations. The decision of the Court of Appeals in the case at bar merely establishes certain

standards concerning when probable future tax payments should be considered. This problem is not unusual and the decision below of the Seventh Circuit is by no means anomalous. In fact, treating income taxes as analogous to life expectancy, earning power, and other evidentiary matters usually considered in determining pecuniary loss, would justify deduction of income taxes in all cases regardless of the amount.

As the Court of Appeals noted, it adopted the rationale of the Court of Appeals for the Second Circuit as "finally crystallized in *Petition of Marina Mercante Nicaraguense, S.A.*, 364 F.2d 118 (2d Cir. 1967)." (Pet., p. 5a). As a case which developed clear principles of decision concerning income tax deductions in arriving at probable future contributions, the *Marina* decision repays examination. Counsel for Petitioner erroneously suggests that it supports his position. (Pet. 3, 8, and 9) In *Marina*, Judge Friendly, writing for the Court, reversed a decision of a District Court which had deducted income taxes from probable future earnings ranging up to $11,500. (364 F.2d at 126) Such incomes were not considered great enough that "failure to deduct for taxes would result in an award that 'would be plainly excessive even after taking full account of the countervailing factors we have mentioned.' . . ." (364 F.2d at 125)

Petitioner, however, attempts to dismiss as "pure dictum" (Pet. 9) the rationale of the *Marina* holding which the Seventh Circuit properly recognized and adopted. The *Marina* opinion explained that "deduction should not be made in 'the great mass of litigation at the lower or middle reach of the income scale' . . . [but that] . . . illustrative examples where a reduction would be required were the cases of a plaintiff with 'potential earnings of $100,000 a year,' . . . [or] . . . where income taxes would

have taken 82% of the estimated earnings." (364 F.2d at 126) Moreover, the Court continued in *Marina* to state that the exception is not "limited to such extreme cases; indeed it has subsequently been held applicable to a geologist with estimated annual income of $16,000 and $25,000. *LeRoy* v. *Sabena Belgian World Airlines,* 344 F.2d 266, 276 (2nd Cir. 1965), cert. den., 382 U.S. 878 (1965)."

Judge Friendly goes on to note that the yearly incomes in the *Marina* case did not compare with "Dr. LeRoy's $16,000 to $25,000 estimated to produce total future income of some $600,000." (364 F.2d at 126). On the other hand, the estimated future earnings of Captain Cox, decedent in the case at bar, of approximately $623,000* and his estimated income "increasing to amounts ranging from $15,655 to $20,600 per annum" (Pet., p. 4a) for the twenty year period during which the Seventh Circuit required deduction is quite comparable to Dr. LeRoy's in the *LeRoy* case.

A thorough analysis of Petitioner's cases in support of her counsel's random arguments would consume more space than the original Petition. The Petition is filled with authority of questionable relevance presented without analysis and virtually no discussion of its pertinence. Indeed, one must be careful to separate holding from implication and implication from irrelevancy in the cases cited. An interesting example is the argument, at page 6 of the Petition, that the measure of damages under the Death on the High Seas Act is "pecuniary loss" not "net income" and, therefore, on the authority of *Noel* v. *United*

---

* This figure is the total of active duty and retirement pay, *i.e.,* $493,674.33, Petitioner's (Libellant below) Ex. 1, and the $10,000 per year for 13 years to be earned in the Captain's civilian career after retirement from the service, as found by the District Court in Finding 27.

Aircraft Corp., 342 F.2d 232 (3d Cir. 1965), which Petitioner states "needs no further elucidation" (Pet. 6), income taxes should not be considered in determining pecuniary loss. Proceeding from this premise, the *Noel* case is described as holding that "income tax computations must be excluded in computing damages in an action under the Death on the High Seas Act" (Pet. 3); as a case in which a District Court was "reversed for . . . [the] . . . specific reason" (Pet. 8) that it considered the element of federal taxation; and as proof that income taxes are not deducted "even in the case of large earners in actions under this statute, . . ." (Pet. 9)

In fact none of the three opinions involved, one by the District Court and two by the Court of Appeals,* mentions the propriety of deducting income taxes in arriving at pecuniary loss. The Court of Appeals in *Noel* did not reverse the lower Court because of consideration given to the impact of income tax. The opinion, at 342 F.2d 239, reversed the lower court's finding that the deceased would likely have had no net income for the first five years of his life expectancy because of uncertain business developments, which finding was "without evidential basis," "wholly speculative," and, therefore, "clearly erroneous." (342 F.2d at 239) It was found that there was evidence to support a finding that the deceased would have had earnings during that period and would have contributed to his survivors even though that might require living beyond his means; and, thus, the District Court improperly employed a standard of "net income"

* *Noel* v. *United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1964) affirming in part 219 F.Supp. 556 (D.C. Dela. 1963) and remanding for consideration of damages. *Noel* v. *United Aircraft Corp.*, 359 F.2d 671 (3d Cir. 1966) remanding with instructions to proceed in accordance with initial decision of the Court of Appeals.

when that consists of speculation as to profits and losses which might result from business ventures. The case had nothing to do with income taxes. The "net income" discussion related not to a deduction of income taxes but rather to the decedent's probable lack of success in a business venture.

Petitioner's argument that District Courts which have provided for deduction of income taxes under the Death on the High Seas Act uniformly have been reversed is deceptive because the cases cited did not involve prospective incomes large enough to justify adjustment by deduction of income taxes in arriving at the decedent's future contributions to his survivors. Petitioner admits that the measure of damages under the statute here involved is similar to that in wrongful death actions under the Jones Act. (Pet. 9) Yet in *Petition of Midwest Towing Co.*, 203 F. Supp. 727, 733 (E.D. Ill. 1962), affirmed as *Midwest Towing Co.* v. *Richardson*, 317 F.2d 270 (7th Cir. 1963), a wrongful death case brought under the Jones Act (46 U.S.C. §688), the District Court deducted taxes without comment and this was not contested on appeal by counsel for Petitioner in the case at bar who was the plaintiff's counsel in that case. Other cases in which District Courts have provided for deduction of income taxes and were not reversed are *DeVito* v. *United Airlines*, 98 F.Supp. 88, 99-100 (E.D.N.Y. 1951) and *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965), cert. den. 382 U.S. 878 (1965). While these cases were not actions under the Death on the High Seas Act, there is no evidence in these cases that the decision to deduct income taxes was considered required by or limited to the statute involved. And, as has been seen above, the *LeRoy* case was cited with approval in *Petition of Marina Mercante Nicaraquense, S. A.*, 364 F.2d 118 (2d Cir. 1966) as an illustrative

example of cases wherein a deduction is proper. *Marina* was an action under the Death on the High Seas Act and the Second Circuit in that case recognized no inherent limit on income tax deductions in the Act itself or the cases interpreting it; limits may be imposed, however, by the amount of prospective future earnings. The decision of the Court of Appeals in the case at bar correctly held that the decedent's large prospective income required a deduction for income taxes in order to arrive at the amount of his probable contributions to his survivors.

In fact, "further elucidation" of the cases Petitioner cites as authority for the position that District Courts must not consider the element of income taxes in computing damages destroys the argument. *United States* v. *Puscedu* 224 F.2d 5 (5th Cir. 1955) (Pet. 3 and 8) and *Payne* v. *Baltimore & Ohio R. Co.* 309 F.2d 546 (6th Cir. 1962) (Pet. 3), for example, supposedly support the argument with reference to the Death on the High Seas Act and the Federal Employers' Liability Act (45 U.S.C. §51, *et seq.*), respectively. *Puscedu,* however, merely footnotes findings of a District Court where it appeared that taxes were not considered in arriving at the award. This does not indicate that the Fifth Circuit "specifically held that income tax computations must be excluded in computing damages in an action under the Death on the High Seas Act." (Pet. 3) *Payne* is simply irrelevant. The issue before the Sixth Circuit in *Payne* was whether the jury should be instructed that the plaintiff's award would not be subject to income tax and it was held that the instruction was properly refused. Throughout the argument, Petitioner has confused the issue involved in the case at bar regarding the deduction of income taxes in computing pecuniary loss, with instructions to a jury concerning a plaintiff's tax

liability on any amount awarded by the jury. This mistake is made, for example, with respect to the contention that the decision below will adversely affect uniform administration of federal wrongful death statutes within the State of Illinois.

II. THE HOLDING OF THE COURT OF APPEALS REGARDING INCOME TAXES DOES NOT IMPEDE UNIFORM ADMINISTRATION OF FEDERAL STATUTES WITHIN THE STATE OF ILLINOIS.

Petitioner argues (Pet. 9-10) that when the Court of Appeals in the case at bar provided for deduction of income taxes in arriving at the pecuniary loss suffered by the deceased's survivors, it disrupted the uniform administration by State and Federal Courts of federal statutes having the same measure of damages. Asserting that the Federal Employers' Liability Act and the Jones Act provide for a determination of pecuniary loss, counsel for Petitioner urges that income taxes may not be deducted in actions brought in Illinois state courts under these statutes whereas in Federal District Courts such deduction is required in appropriate cases by the opinion of the Court of Appeals in the instant case interpreting the Death on the High Seas Act, also a pecuniary loss statute. The short answer to Petitioner's argument is that uniformity can be achieved by the Courts of the State of Illinois following federal decisions interpreting statutes of the United States. See: *Garrett* v. *Moore-McCormack Co.* 317 U.S. 239, 243-245 (1942) (a decision asserting the primacy of federal law in achieving uniform administration of the Jones Act) and *Dice* v. *Akron, C. & Y. R. Co.* 342 U.S. 359, 361-62 (1951) (a decision establishing the same principle for the Federal Employers' Liability Act).

Petitioner lists two Illinois cases for the proposition that Illinois decisions prohibit the deduction of income taxes in arriving at pecuniary loss. Neither case does so.

Hall v. *Chicago & N. W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1955) was not a wrongful death action and the question of deduction of probable future income taxes was not discussed or decided. The *Hall* case held only that remarks of counsel to a jury that a personal injury damage award is not taxable are prejudicial and the basis for a new trial (5 Ill. 2d 135, at 149 and 152, 125 N.E. 2d 77 at 85 and 86 (1955)). *Allendorf* v. *Elgin J. & E. Ry. Co.* 8 Ill. 2d 164, 133 N.E. 8d 288 (1956), the second case cited, peripherally discusses the issue of tax deduction but contains no holding on the subject. The Court in *Allendorf* remarked that actuarial testimony concerning present value of future contributions after deduction of taxes was "needlessly favorable" in light of *Hall.* (See 8 Ill. 2d 164 at 181, 133 N.E. 2d 288 at 296 (1956)) This was merely dicta arising from an inapposite holding in the prior case and an apparent misapprehension by the Court in *Allendorf* of the matter decided in *Hall.* These two cases are not worthy of consideration on the precise point at issue in the case at bar.

CONCLUSION

Because the Petition presents no question worthy of review by this Court and the arguments it advances are unsupported by the very authority relied upon, the writ should be denied.

Respectfully submitted,

Owen Rall
Irving G. Swenson
John W. McCullough

Peterson, Lowry, Rall, Barber & Ross
Of Counsel

December 22, 1967

SUPREME COURT, U. S.

FILED

NOV 24 1967

JOHN F. DAVIS, CLERK

No. 853

In the

Supreme Court of the United States

OCTOBER TERM, 1967

NORTHWEST AIRLINES, INC., a Minnesota Corporation,

Petitioner,

vs.

IRENE COX, Administratrix of the Estate of Randall S. Cox, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OWEN RALL
IRVING G. SWENSON
JOHN W. MCCULLOUGH,
135 South LaSalle Street
Chicago, Illinois 60603,
Attorneys for Petitioner

PETERSON, LOWRY, RALL, BARBER & ROSS
135 South LaSalle Street
Chicago, Illinois 60603,
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons Relied on for the Allowance of the Writ	6

CITATIONS

CASES

Admiral Towing Co. v. *Woolen*, 290 F.2d 641 (9th Cir., 1961) 9

Ayres Marine Service v. *W. Horace Williams Co.*, 213 F.2d 27 (5th Cir., 1954) 15

Blumenthal v. *United States*, 306 F.2d 16 (3rd Cir., 1962) 13

Cortes v. *Baltimore Insular Line*, 287 U.S. 367, 375 (1932) 9

Haasman v. *Pacific Alaska Air Express*, 100 F.Supp. 1 (D.C. Alaska 1951), aff'd sub nom. *Des Marias* v. *Beckman*, 198 F.2d 550 (9th Cir., 1952), cert. den. 344 U.S. 922 (1953) 13

Hawks v. *Hamill*, 288 U.S. 52 (1933) 10

Johnson v. *United States*, 333 U.S. 46 (1948) 5, 7, 8, 9

Russell Polling & Co. v. *Tug Alice M. Moran*, 205 F. Supp. 874 (S.D.N.Y. 1962) 15, 16

Schulz v. *Pennsylvania R. Co.*, 350 U.S. 523 (1956) 9

PAGE

Sweeney v. *Erving*, 228 U.S. 233 (1913) 5, 6, 11, 12

The Arizona v. *Anelich*, 298 U.S. 110 (1935) 9

Trihey v. *Transocean Airlines, Inc.*, 255 F.2d 824 (9th Cir., 1958) cert. den. 358 U.S. 838 (1958) 14

United States v. *Johnson*, 160 F.2d 789 (9th Cir., 1947) 8

W. Horace Williams Co. v. *The Wakulla*, 109 F.Supp. 698 (E.D.La., 1953) 15

STATUTE

Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. §761 3

APPENDIX

Opinion of the Court of Appeals A.1

Judgment of the Court of Appeals A.7

Order of Court of Appeals Denying Rehearing A.8

Order of Court of Appeals Denying Rehearing En Banc A.9

Findings of Fact and Conclusions of Law of the District Court A.10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No.

NORTHWEST AIRLINES, INC., a Minnesota Corporation,

Petitioner,

vs.

IRENE COX, Administratrix of the Estate of Randall S. Cox, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Northwest Airlines, Inc. ("Northwest") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered May 16, 1967 on which rehearing and rehearing *en banc* was denied August 28, 1967.

OPINIONS BELOW

There was one opinion below: that of the Court of Appeals filed on May 16, 1967, which affirmed in part the District Court and remanded with directions to modify the judgment as to damages: 379 F.2d 893; Appendix

p. A. 1, below.[1] The findings of fact and conclusions of law of the District Court, not reported, are printed in the Appendix at p. A. 10.

The libellant, Irene Cox, who is the respondent to the present petition, has filed in this Court the printed record of the Court of Appeals, and has notified us of her intention also to file a petition for certiorari. Therefore, the record for the present petition will be the printed record of the Court below filed on the petition for certiorari which will be entitled "Irene Cox, as Administratrix of the Estate of Randall S. Cox, Deceased, Petitioner, vs. Northwest Airlines, Inc., a Minnesota corporation, Respondent, Oct. T. 1967, No. ....."

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1967 and became final when a timely petition for rehearing and rehearing *en banc*, filed by libellant-appellee, was denied on August 28, 1967. The mandate has been stayed on motion of libellant pending filing of a petition by her in this Court. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In this action under the Death on the High Seas Act, which requires proof of negligence, did the Court of Appeals err in holding that proof of the unexplained destruction of an aircraft, flying over the high seas, was sufficient to prove negligence resulting in the death of libellant's husband, a passenger, although Northwest, the aircraft's owner, proved due care in all provable respects?

---

[1] References to this opinion and to other material included in the separately-paged Appendix bound with this petition are to the pages of the Appendix noted thus: (A. 1, A. 2, etc.)

2. Did the Court of Appeals properly apply the decisions of this Court governing the rules of res ipsa loquitur when that Court placed on Northwest the burden of proving the cause of the crash although neither Northwest nor any living person knows the cause?

STATUTE INVOLVED

The statute involved is §1 of the Death on the High Seas Act, 46 U.S.C. § 761, and is as follows:

> "§761. Right of action; where and by whom brought
>
> Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." (March 30, 1920, c. 111, §1, 41 Stat. 537).

STATEMENT OF THE CASE

I. Basic Facts

Libellant's decedent, U.S. Army Captain Randall S. Cox, 29, was a passenger aboard Northwest's Douglas DC-7C aircraft N290, flight 293, on June 3, 1963. On that date, flight 293 departed McChord Air Force Base, near Seattle, Washington for Elmendorf, Alaska. Its crew had been briefed on the weather by its dispatch office at the Seattle Airport and by a U.S. Air Force weather specialist at McChord. The flight crew was duly certificated and rated on the equipment flown. The aircraft maintenance log was signed off at 7:30 A.M. by

Northwest's local maintenance representative at McChord. The flight was then boarded and took off from McChord Air Force Base at approximately 8:32 A.M.

The last known radio transmission from flight 293 was at 11:07 A.M., reporting its position as over Domestic Annette[2] at an altitude of 14,000 feet at 11:06, and requesting clearance to climb to 18,000 feet. No reason was given for the requested change of altitude. The following day, June 4, 1963, 1,500 pounds of wreckage from flight 293 were recovered from the Pacific Ocean about 35 nautical miles west of Domestic Annette.

As the Court of Appeals stated, "There is no evidence as to the cause of the aircraft's crash into the ocean or concerning what happened to affect the operation of the aircraft during the period following 11:07 A.M. and prior to the crash." (A. 3)

II. Proceedings Below

An action was filed in the Northern District of Illinois, Eastern Division, in Admiralty under §1 of the Death on the High Seas Act (46 U.S.C. §761, set out above) to recover damages allegedly sustained by the libellant for the death of her husband Randall S. Cox. She alleged negligence and asserted the applicability of the principle of res ipsa loquitur. The case was heard by the Honorable Michael L. Igoe, sitting without a jury, and upon the conclusion of the evidence and after the filing of briefs judgment was entered against Northwest Airlines in the amount of $329,956.59. Thirty-one findings of fact and three conclusions of law were entered by the District Court (A. 10).

---

[2] Domestic Annette is a fix-point over the Pacific Ocean south and west of the southern tip of Alaska at which directional radio bearings are obtained along the air route from McChord Air Force Base to Elmendorf, Alaska.

Northwest Airlines appealed from the judgment—contesting findings and conclusions of the District Court concerning both negligence and damages. On the issue of negligence, the Court of Appeals agreed with Northwest that the District Court's findings in that respect—excepting Number 19[3]—would not sustain a conclusion that the airline was at fault. (A. 2) It thought, however, that the findings (except No. 19) were not meant to do so. (Id.) Turning to Finding 19, the Court of Appeals held that a conclusion of negligent conduct was sufficiently supported by res ipsa loquitur's inference of negligence if Northwest failed to explain why the plane crashed (A. 2-A. 4). And it reasoned that this result was required by *Sweeney* v. *Erving*, 228 U.S. 233 (1913) and *Johnson* v. *United States*, 333 U.S. 46 (1948).

On the matter of damages, the Court of Appeals modified the findings of the District Court regarding the propriety of deduction for income taxes from decedent's probable future earnings and required such deduction when the probable income exceeded $15,655. per year (A. 5). It also held that the item of damages representing loss of inheritance should have been reduced to its present value, consistent with the federal rule. Libellant requested a rehearing and rehearing *en banc* concerning the Court of Appeals' ruling on income tax deductions and loss of inheritance. The petition for rehearing was denied on August 28, 1967.

---

[3] The trial court found in Finding 19 that "[t]he instrumentality which produced the death of Randall S. Cox was under the exclusive control and management of the respondent and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and, further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; that the facts herein justify a finding of negligence."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. This Case Creates a Unique Problem Which This Court Should Resolve.

The Court of Appeals held that respondent, Northwest Airlines, had to offer a complete explanation of the cause of the accident to prevail against the inference of negligence arising from res ipsa loquitur. Without this explanation—and in spite of an extensive showing of due care—the inference was considered preponderant evidence although it lacked even minimal support. Northwest presented every available evidence of ample precaution in all matters concerning its aircraft, its crew, and its dispatching procedures. Nowhere in its conduct did the District Court or the Court of Appeals find negligent acts or omissions or even suspicious circumstances. And yet the Court of Appeals dismissed such a showing as mere "general evidence of due care" without "substantial import" where the important unanswered question was "[w]hether due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation of the aircraft . . . and of what if anything was or could have been done about it." (A. 3) This ignores the crucial problem of what, if anything, was or could have been *known* about it.

This Court has never held that the application of res ipsa loquitur requires an explanation—only that such may be warranted. *Sweeney* v. *Erving*, 228 U.S. 233, 240 (1913). Where this is warranted and given—composed of all known facts and circumstances and demonstrating consistent regard for safety—a defendant surely has

satisfied any reasonable requirement of proof. If such proof is "without substantial import" unless it includes an explanation which only omniscience can provide, defendants are saddled with an obligation which cannot be discharged. The effect of the decision based upon this reasoning is to shift the burden of proof to the defendant and require the impossible in order to sustain that burden.

II. The Decision Below Misinterprets and Incorrectly Applies Decisions of This Court.

A. The Court of Appeals Erred in Its Interpretation and Application of Johnson v. United States, 333 U.S. 46 (1948).

Noting that "the cause of the crash which resulted in the death of Randall S. Cox is wholly unexplained" (A. 4), the Court below seemingly believed that this Court's opinions regarding res ipsa loquitur required a full explanation of an accident's cause—even though an explanation is impossible. The following language from *Johnson* v. *United States,* 333 U.S. 46, 49 (1948) was its authority:

> No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events.

In *Johnson,* applying res ipsa loquitur, this Court required a complete explanation by the defendant of an injury to a seaman and reversed the court below.

Evidence of due care by the shipowner in *Johnson* was available but was not offered, whereas in the case at bar all available evidence of due care was presented and the only proof not offered was unavailable because no person survived the crash.

The *Johnson* defendant offered nothing to show its due care in the circumstances surrounding the accident—evidence peculiarly within its grasp as opposed to evidence available to the injured seaman. (*United States* v. *Johnson*, 160 F.2d 789 at 792 (9th Cir., 1947)). The plaintiff in *Johnson* not only proved the occurrence of an accident which raised a strong inference of negligence under the doctrine of res ipsa loquitur but also offered evidence tending to prove that he was not furnished a safe place to work.

In the case at bar, the Court of Appeals conceded that none of libellant's evidence afforded "a basis for finding and concluding that any specific conduct attributable to the appellant [Northwest] constituted negligence and was a proximate cause of the crash." (A. 2) The Court of Appeals recognized that the District Court's conclusion of negligence was bottomed on Finding 19 alone —that which noted that the plane crashed and that negligence could be inferred from that fact (A. 2). Thus, libellant's only probative evidence demonstrated that an accident happened. Nothing more.

Northwest, on the other hand, proved its due care at length. To be sure, Northwest did not explain why the plane crashed; and that was determinative for the Court of Appeals. Reciting *Johnson's* general language concerning permissible inferences from "unexplained events," the court below interpreted this to suggest that all evidence of Northwest's precautions, being all of those precautions which were susceptible of proof, was not "of substantial import" unless respondent also proved that "due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation . . . . ." (A. 3). Thus, the *Johnson* principle,

originating in a case in which a defendant knew more than it was willing to prove, was expanded to require respondent to prove that which it could not ever prove under the circumstances that there were no survivors of the crash at sea and no provable explanation of what actually happened. The *Johnson* rule is unique. It is more properly applicable to suits between employer and employee and the language of that decision regarding res ipsa loquitur should not be applied generally.

Jones Act plaintiffs traditionally have been regarded as enjoying a preferred position vis a vis other tort complainants in that the owners of ships owe a duty to their employees higher than that of other defendants. *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367, 375 (1932); *The Arizona* v. *Anelich,* 298 U.S. 110, 123 (1935). Also, the employer usually possesses superior knowledge of the circumstances aboard his vessels and should not be allowed to exploit the sailor's isolation and relative ignorance concerning such circumstances as may cause him injury.

Consonant with this reasoning, the concept of res ipsa loquitur set forth in *Johnson,* has peculiar application to men injured in maritime employment.[4] The *Johnson* case prevents a defendant-shipowner from withholding his superior knowledge of unusual circumstances sur-

[4] This has been recognized by other Courts of Appeals. For example, *Admiral Towing Company* v. *Woolen,* 290 F.2d 641 (9th Cir. 1961) in remarking on this Court's application of res ipsa loquitur in *Schulz* v. *Pennsylvania R. Co.,* 350 U.S. 523 (1956), a Jones Act case, said "The [Supreme] Court . . . extended its rule of 'permissible inferences from unexplained events.' *Johnson* v. *United States, supra.* It marked the further development, in this type of case, of the Court's special brand of res ipsa loquitur." 290 F.2d at 652.

rounding unexplained events in the hope that the plaintiff may lose because of the failure of proof.

There is no reason to extend a unique application of the res ipsa loquitur concept, developed to protect wards of Admiralty, to all negligence actions—or even to all those fortuitously tried in Admiralty. The Court of Appeals, however, applied *Johnson's* special rationale to litigation involving parties where superior knowledge is not present and where its requirement of a complete explanation is not only illogical but works an injustice.

In the present case, the accident was not simply unexplained; it could not be explained. No Court which has considered the case at bar intimated that it knew the cause of the accident. To say, as the Court below did, that only a complete explanation of the Northwest crash rebuts the inference arising from res ipsa loquitur, is inconsistent with the rule that the plaintiff must present preponderating evidence. Such a requirement warps the outlines of the general law of negligence to require the defendant in an unexplained accident to sustain the burden of proof.[5]

---

[5] It should be noted that Mr. Justice Frankfurter in his dissent in *Johnson* v. *United States*, 333 U.S. 46, remarked (p. 56) that the holding of the Court regarding res ipsa loquitur might be too broadly interpreted even in cases involving the Jones Act: "One cannot be unmindful that 'the radiating potencies of a decision may go beyond the actual holding.' *Hawks* v. *Hamill*, 288 U.S. 52, 58. Lower courts read the opinions of this Court with a not unnatural alertness to catch intimations beyond the precise ratio decidendi. A decision like this exerts an influence, however unwittingly, well calculated to lead lower court judges to avoid reversals by deciding compassionately for the plaintiff in these negligence cases confident that such decisions are not likely to be reviewed here." The opinion of the Court of Appeals in the case at bar discloses just such a search for meaning which led it beyond *Johnson's* rationale and into error.

B. The Court of Appeals Erred in Its Interpretation and Application of Sweeney v. Erving, 228 U.S. 233 (1913).

The Court of Appeals cited the *Sweeney* case for the unchallengeable proposition that res ipsa loquitur's inference in certain cases is warranted but not compelled.[8] Had Northwest argued the principle's inapplicability to this case, this language would have more relevance. But the issue was not cast in that light. Northwest argued that the unaided inference of res ipsa loquitur could not satisfy the libellant's burden of proof when met by evidence of due care in every respect susceptible of proof under the circumstances of this case.

When this is understood, another vital and more pertinent aspect of the *Sweeney* holding has great significance for this case—and was neglected by the Court below. *Sweeney* teaches that "Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is

---

[8] The rule governing the application of res ipsa loquitur in this Court, contained in the leading case of *Sweeney* v. *Erving*, 228 U.S. 233, 240 (1913), is:

> In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.

with the plaintiff." (228 U.S. at 240) And this because, "where that rule does apply it has not the effect of shifting the burden of proof." (228 U.S. at 238)

When the Seventh Circuit misread the *Johnson* case to require an explanation of all occurrences where res ipsa loquitur applies—whether or not this is possible—it contravened the holding of *Sweeney*. If the only way a defendant can adequately fulfill the duty on its general issue denying negligence is by a showing of complete absence of fault in unknown and unprovable circumstances, then the burden of proof has actually been shifted to the defendant. The Court has then turned res ipsa loquitur into a presumption of negligence and has said that the very mystery which causes the plaintiff to receive the principle's aid must somehow be explained by the defendant if the latter is to prevail. This is a placing of the burden of ultimate proof on the defendant, not on the plaintiff where it belongs.

The *Sweeney* opinion held only that the facts may call for an explanation, not that they require one. (228 U.S. at 240) Certainly not that such facts call for omniscience and without that omniscience compel a finding of negligence. As it had to, the Court cited *Sweeney* as consistent with its decision but again ignored the relevant holding: "res ipsa loquitur means that the facts of the occurrence . . . make a case to be decided by a jury, not that they forestall the verdict." (228 U.S. at 240)

The effect of the holding of the court below that, notwithstanding proof of Northwest's due care in all respects which were provable, Northwest was liable for the unexplained crash of the aircraft under the doctrine of res ipsa loquitur is to hold that in all cases of unexplained crashes an airline may be held liable under that doctrine.

This removes the burden of proof of negligence from the plaintiff's shoulders and makes the doctrine of res ipsa loquitur compulsive rather than simply permissive. It makes the airline an insurer, and relieves the plaintiff of proving negligence which in this case the Death on the High Seas Act requires in order for the libellant to recover.

The cases cited by the Court of Appeals do not dispose of Northwest's argument that res ipsa loquitur will not sustain libellant's burden of proof when the defendant has offered all of the available evidence, within anyone's knowledge, to disprove that it was negligent.

In *Haasman* v. *Pacific Alaska Air Express,* 100 F. Supp. 1 (D.C. Alaska 1951) aff'd. sub. nom. *Des Marias* v. *Beckman,* 198 F. 2d 550 (9th Cir., 1952), cert. den., 344 U.S. 922 (1953), the defendant offered no evidence and stipulated that if the doctrine of res ipsa loquitur applied judgment might be entered for the plaintiff. The case is to be contrasted with the case at bar in which the defendant offered all of the evidence of due care which was within the power of anyone to offer.

The Court below in the case at bar cited the concurring opinion in *Blumenthal* v. *United States,* 306 F.2d 16 (3rd Cir., 1962) which did not necessarily decide whether res ipsa alone sustained the burden of proof as the court found "culpable negligence" in the use of uninspected and improperly maintained aircraft for hauling passengers rather than for hauling the cargo to which the aircraft was restricted—306 F.2d at 17. The concurring opinion (p. 19) was directed to the central issue on appeal, whether all negligent acts or omissions occurred within the territorial waters of Japan, and contained dicta to the effect that res ipsa might properly apply and that

the substantial evidence of negligent operation and maintenance called for an explanation. Libellant in *Blumenthal* did not have to rely upon only inferential negligence arising from an unexplained crash in order to succeed; libellant here was in that posture. The *Blumenthal* opinion and concurrence, hence, do not sustain the opinion of the court here.

Likewise, *Trihey* v. *Transocean Airlines, Inc.*, 255 F.2d 824 (9th Cir., 1958), cert. den. 358 U.S. 838 (1958) is hardly dispositive of the issues below. The *Trihey* court refused to disturb findings that an airline was not negligent in an unexplained crash. It noted that the District Court was not clear concerning whether it had applied res ipsa loquitur—and the Ninth Circuit would not say that as a matter of law it should have done so or that "had the rule been relevant and applicable here it could by itself require or sustain a verdict for plaintiff." 255 F.2d 824, 831. We ask the Court to make that determination here.

III. The Decision Below Conflicts In Principle With Decisions of the Court of Appeals for the Fifth Circuit.

At least one other Court of Appeals has considered whether res ipsa loquitur standing alone supplies preponderating evidence when faced by substantial evidence to the contrary; and its rationale implies acceptance of the proposition that it does not. In that Court facts and circumstances other than the occurrence itself established negligence; and the opinion was careful to note that it was unnecessary to rely upon res ipsa loquitur as an unaided evidentiary device. The corollary of the opinion is that—if faced with the necessity of relying upon the unsupported inference—the court would not have done so.

The Fifth Circuit encountered the argument in *Ayres Marine Service* v. *W. Horace Williams Co.*, 213 F.2d 27 (5th Cir. 1954). The District Court had found the evidence to show that a tow-line put improper strain upon a winch because the line was not snubbed to bitts as it should have been. As a result of improper coupling, the towed barge was damaged. (*W. Horace Williams Co.* v. *The Wakulla,* 109 F.Supp. 698 (E.D. La. 1953)) The Court of Appeals affirmed and answered appellant's argument that the inference alone would not sustain the burden. "[T]he doctrine is an aid to the plaintiff in sustaining the burden of proving breach of the duty of due care but does not avoid the requirement that upon the whole case he must prove the breach by a preponderance of evidence. But what appellant overlooks is that the District Court did plainly state that the burden of proof was upon the libellant. *And, while the court thought libellant was entitled to invoke the aid of the doctrine, it did not base its decision solely on that ground* for it held and we think properly that libellant sustained its burden of showing negligence on the part of appellant by a preponderance of the evidence." 213 F.2d at 30 (Italics ours.)

The Court of Appeals for the Fifth Circuit would not have sustained the District Court had the inference been the only proof available to the libellant. As a matter of law, it will not constitute preponderating evidence in the Fifth Circuit. This interpretation was also given to this holding by the District Court of the Southern District of New York. In *Russell Polling & Co.* v. *Tug Alice M. Moran,* 205 F.Supp. 874 (S.D.N.Y. 1962) The Court said: "Libellant cannot rely solely on the doctrine of res ipsa loquitur to establish or prove negligence on the part of respondent. In *Ayres Marine Service* v. *W. Horace Williams,* 213 F.2d 27 (5th Cir. 1954) the libellant

sought to invoke the doctrine of res ipsa loquitur to sustain its burden of establishing negligence on the part of respondent. However, the Court in its opinion was careful to point out that, while the doctrine of res ipsa loquitur may be used as an aid to a libellant, the negligence of the respondent must be shown affirmatively by a preponderance of evidence. Under the federal rule, the doctrine of res ipsa loquitur does not shift the burden of proof to the party against whom it is being invoked." 205 F.Supp. *supra*. at 876.

CONCLUSION

Because of the importance of air transport and the frequent occurrence of unexplained and inexplicable airplane crashes, the question whether an airline is to be held liable on the theory of negligence, although it proves due care in every aspect of its operation of the airplane then within its power to prove, is an important question which should be decided by this Court.

Respectfully submitted,

Owen Rall
Irving G. Swenson
John W. McCullough

Peterson, Lowry, Rall, Barber & Ross
Of Counsel

November 24, 1967

APPENDIX

Opinion of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966—APRIL SESSION, 1967

No. 15897

IRENE COX, Administratrix of the Estate of RANDALL S. COX, deceased,
Libellant-Appellee,
v.
NORTHWEST AIRLINES, INC., a Minnesota corporation,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 16, 1967

Before DUFFY, *Senior Circuit Judge,* and CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* The appellant, Northwest Airlines, Inc., prosecutes this appeal from a judgment entered against it in an admiralty action instituted in the District Court by the libellant-appellee, Irene Cox, administratrix. Libellant sought recovery of damages under the Death on the High Seas Act (46 U.S.C.A. §761 et seq.) for the death of her husband. The action was tried to the court without a jury. The court made and entered findings of fact and conclusions of law, and awarded judgment against the appellant for $329,956.59.

The record discloses that the libellant's decedent, her husband, Randall S. Cox, a Captain in the United States

Army, 29 years of age, was a passenger on appellant's Douglas DC-7C airplane N290, flight 293, which crashed in the Pacific Ocean on June 3, 1963 during a flight from McCord Air Force Base, near Seattle, Washington, to Elmendorf, Alaska, at approximately 11:12 A.M. at a point about one hundred sixteen miles west-southwest of Annette Island off the west coast of Canada. The flight had taken off from McChord at about 8:32 A.M. after having been briefed on the weather by both its dispatch office at the Seattle Airport and by a U.S. Air Force weather specialist at McChord, and having followed the usual procedures in preparation for flight. The crew reported by radio at 11:07 A.M. that it had been over Domestic Annette at 11:06 at an altitude of 14,000 feet and requested clearance to climb to 18,000 feet. No reason for the requested change in altitude was given. Domestic Annette is a fix-point at which directional radio bearings are obtained along the air route from McChord to Elmendorf. This was the last known transmission made by the crew of the aircraft. On the following day, June 4, 1963, floating debris was sighted in the Pacific Ocean about 35 nautical miles west of Domestic Annette. Approximately 1,500 pounds of wreckage identified as being from the aircraft, including life vests still encased in their plastic containers and extremely deformed seat frames, was recovered. The bodies of none of the crew or passengers were ever recovered.

The District Court made a number of findings with respect to facts and circumstances concerning the flight. But none of these subsidiary findings afford, or were relied upon by the court as affording, a basis for finding and concluding that any specific conduct attributable to the appellant constituted negligence and was a proximate cause of the crash. The court's conclusion that the negligence of appellant was the proximate cause of decedent's death is predicated upon the court's finding that:

> "[A]s a result of the occurrence Randall S. Cox met his death. The instrumentality which produced the death of Randall S. Cox was under the exclusive control and management of the [appellant] and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and,

further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; that the facts herein justify a finding of negligence."

The appellant recognizes that the doctrine of res ipsa loquitur may properly have application in actions involving airline accidents. But the appellant contends that in the instant case it was error to apply that doctrine in resolving the issue of liability because there is substantial proof of the exercise of due care by the appellant and no countervailing evidence of specific negligence or even of unusual circumstances. Appellant urges that evidence of due care on its part precludes any inference of negligence arising from the occurrence in the absence of at least minimal supporting evidence and, therefore, libellant has not sustained the burden of proof requisite to an ultimate finding of negligence and has failed to prove her case by a preponderance of the evidence.

The evidence of due care to which appellant alludes concerns its maintenance records and procedures with respect to the aircraft involved; the qualified and certified status, and the competence, of the operating personnel of the aircraft and of the dispatcher; the safety training received by the crew; and the evidence that the flight was properly dispatched and the weather normal.

There is no evidence as to the cause of the aircraft's crash into the ocean or concerning what happened to affect the operation of the aircraft during the period following 11:07 A.M. and prior to the crash. In the absence of such evidence, the probative value of appellant's general evidence of due care is not of substantial import. Whether due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation of the aircraft can be appraised only in the light of knowledge of what that occurrence was, whether human or mechanical failure or some other incident, and of what if anything was or could have been done about it.

We perceive nothing in appellant's due care evidence which precludes an application of the res ipsa loquitur doctrine or conditions such application upon the libellant's responding with evidence to support some specific

negligent act or omission on the part of appellant. Here the cause of the crash which resulted in the death of Randall S. Cox is wholly unexplained. And, as was cogently observed in *Johnson* v. *United States*, 333 U.S. 46, 49:

> "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events."

We are of the opinion that the court properly applied the doctrine of res ipsa loquitur and that its finding of negligence was a permissible one—warranted though not compelled (*Sweeney* v. *Erving*, 228 U.S. 233, 240)—and that the court's conclusion on the issue of appellant's liability is thus supported by the evidence and the application of correct legal criteria. *Haasman* v. *Pacific Alaska Air Express*, D.C.D.Alaska, 100 F. Supp. 1, affirmed *sub. nom. Des Marais* v. *Beckman*, 9 Cir., 198 F. 2d 550. Cf. *Blumenthal* v. *United States*, 3 Cir., 306 F. 2d 16, 19; *Trihey* v. *Transocean Air Lines*, 9 Cir., 255 F. 2d 824.

We turn to consideration of appellant's contentions that the District Court erred in its computation of the amounts of certain of the specific elements of damage it included in the $329,956.59 award it made.

Although the awards made on certain of the elements of damage here allowed appear to be generous we cannot say that they are clearly excessive. But this does not preclude us from reviewing the amount allowed for a given element from the standpoint of determining whether the court made an error in the manner of its computation of "a fair and just compensation for the pecuniary loss sustained" by the widow and two minor children of the decedent with respect to an otherwise proper element of damage. And, in this connection, our review of the record, and of the court's findings and computations, convinces us that the court erred in two respects.

The court's computation of the loss of future contributions to the widow and children on the basis of what the court found the decedent's probable future earnings plus retirement income would have been was predicated on probable earnings and income increasing

to amounts ranging from $15,655 to $20,608 per annum for the twenty-year period commencing with 1979. No reduction was made for income tax the decedent would have paid on the earnings and income so attributed to this twenty-year period. The deceased's beneficiaries could not logically and reasonably have expected to receive the money he would have paid in such taxes had he lived. Only the net income would have been available for their support. And there can be no pecuniary loss of income which would not have been available for contribution.

We agree with the rationale of the United States Court of Appeals for the Second Circuit as it appears to have been finally crystallized in Petition of Marina Mercante Nicaraguense, S.A., 364 F. 2d 118, and conclude that the income level here attributed to the twenty-year period commencing with 1979 is such that a reduction for income tax is required to be made from the annual gross income during that period.[1] This is a case where the impact of income tax has a significant and substantial effect in the computation of probable future contributions and may not be ignored. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and probable future earnings, nevertheless, an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before. *O'Connor* v. *United States*, 2 Cir., 269 F. 2d 578, 584.

The damages award also embraces an item of loss of inheritance to the widow predicated upon the court's findings that the deceased, had he lived his life expectancy at age 29.14, would have been survived by his wife and would have left an estate valued at $30,000. The court did not indicate or specify that this figure represented present value, and the record will not support an assumption that it did. The court's failure to discount this amount to its present value was error. A finding of loss based on a future expectancy must be reduced to present value when measuring pecuniary loss in federal wrongful

[1] The decedent's probable income level attributed to the period from his death until the year 1979 is not such that the impact of income tax need be considered.

death cases. *Montellier* v. *United States*, D.C. E.D. N.Y., 202 F. Supp. 384, 424.

The appellant advances certain additional contentions with respect to the propriety of the damages awarded. While we are not unimpressed by the merits of these arguments, they concern neither errors of computation nor the legal permissibility of the element of damage involved. These matters were peculiarly within the province of this trier of the facts, and we refuse to disturb his considered judgment thereon. Suffice it to say that we perceive no basis for a conclusion that the factual findings on which these allowances rest are clearly erroneous. Nor do they result in making the award of damages clearly excessive. We, therefore, will not extend this opinion to discuss these additional contentions.

The judgment of the District Court is affirmed insofar as it adjudicates the issue of the liability of the appellant, Northwest Airlines, Inc., to the libellant, and the cause is remanded to the District Court with directions that the court modify the judgment by reducing the amount of damages awarded therein to conform with the views herein expressed.

A motion of the libellant-appellee to strike from an additional appendix incorporated in appellant's reply brief copies of certain post-trial correspondence addressed to appellant's counsel from an actuarial firm was taken with the case at the time of oral argument. The material to which the motion is addressed purports to review and analyze the computations contained in the District Court's findings and to supply further actuarial computations. The motion to strike is granted. An attempt to so supply matter dehors the record is improper.

In view of the disposition we have made of the appeal it is ordered that no costs on appeal be allowed to the libellant-appellee and that one-third of the appellant's costs on appeal be taxed and allowed against the libellant-appellee.

AFFIRMED IN PART AND
REMANDED WITH DIRECTIONS
TO MODIFY DAMAGES AWARDED.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Tuesday, May 16, 1967

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 15897
IRENE Cox, Administratrix of the Estate of RANDALL S. Cox, deceased,
Libellant-Appellee,
v.
NORTHWEST AIRLINES, INC., a Minnesota corporation,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, and that this cause be, and it is hereby, REMANDED to the said District Court with directions to modify damages awarded, in accordance with the opinion of this Court filed this day.

Order of Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Monday, August 28, 1967

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 15897

IRENE COX, Administratrix of the Estate of RANDALL S. COX, deceased,

Libellant-Appellee,

v.

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED that appellee's petition for a rehearing of this cause be, and the same is hereby, DENIED.

Order of Court of Appeals Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Before

Monday, August 28, 1967

Hon. JOHN S. HASTINGS, *Chief Judge*

Hon. F. RYAN DUFFY, *Senior Circuit Judge*

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

IT IS ORDERED that appellee's motion filed herein on June 6, 1967, that a certain matter be heard *en banc*, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED by the Court *en banc* that appellee's petition for a rehearing *en banc* of this cause be, and it is hereby, DENIED.

(Judges Schnackenberg, Knoch and Cummings voted to grant the petition for rehearing *en banc*).

IN THE UNITED STATES DISTRICT COURT

* * (Caption—In Admiralty No. 64 C 1145) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law in this case.

FINDINGS OF FACT

1. This is an action instituted by libellant, I. Irene Cox, Administrator of the Estate of Randall S. Cox, Deceased, against Northwest Airlines, Inc., alleging damages sustained by the widow and next of kin of the deceased, Randall S. Cox, under the Federal statute commonly referred to as the Death on the High Seas Act, 46 U.S.C.A., §761.

2. That respondent, Northwest Airlines, Inc., had, prior to June 3, 1963, entered into an agreement with the Military Air Transport Service (MATS) to fly military personnel to and from various Air Force bases, including Elmendorf Air Force Base, Alaska, and McChord Air Force Base, Washington. Respondent had two aircraft which it used in such service and which had been modified to conform to MATS specifications. MATS specifications included changing the configuration of the cabins to permit greater passenger density, thus allowing for a larger number of passengers and more baggage than ordinarily carried on respondent's regular commercial service.

3. That on June 3, 1963, respondent owned and operated a Douglas DC-7C four-engine aircraft numbered N290, which was scheduled to fly that day as Northwest charter flight 293 from McChord Air Force base, Washington, to Elmendorf Air Force base, Alaska, carrying 95 passengers and a crew of six. The decedent, Randall S. Cox, was a passenger for hire aboard this flight, operated and controlled solely by respondent.

4. Joint responsibility for the flight is shared by the captain and the flight dispatcher. The flight dispatcher in this case was Gabriel McMechan, an employee of re-

spondent stationed at the Seattle-Tacoma airport. Respondent did not have a dispatcher at McChord.

5. The flight dispatcher prepared the flight plan prior to the arrival of the crew. He drew up his own opinion of the forecast based on weather forecasts received from the United States Weather Bureau for local and Alaska weather, and from a Canadian weather bureau. These reports indicated the following: An occluded front just east of Annette Island, Alaska, with occasional moderate turbulence expected near the front to an altitude of 22,000 feet, with similar turbulance below 13,000 feet. From such information, he flight-planned a recommended altitude of 14,000 feet for the trip.

6. McMechan had no formal meteorological training and was not a certified meteorologist, and did not confer at any time with any certified meteorologist concerning the flight in question.

7. The pilot and co-pilot checked in at the Seattle-Tacoma airport at about 6:15 A.M., June 3, 1963, where they were briefed by McMechan. This briefing included weather briefing. The weather forecasts used by him were approximately 3¾ hours old at the time of the weather briefing, and 5¾ hours old when the flight departed at approximately 8:32 A.M. These weather reports are made part of the clearance form and are a part of the flight plan.

8. Another weather briefing was given at McChord by Sergeant Ramsey of the weather squadron. He was not a certified meteorologist. His forecast indicated light to moderate rime icing at 14,000 feet along the route. Some light to moderate turbulence was forecast at the northern end of the route. He gave this information to the captain of Flight 293.

9. The flight dispatcher is required by Civil Air Regulations then in effect (14 C.F.R. 41.310) to take familiarization flights in the type of aircraft he is dispatching, over the route. McMechan had never taken such a flight in a DC-7C modified to MATS configurations.

10. The flight had an estimated time of five hours and twenty-six minutes, almost all of it over water.

11. The flight was planned to pass over a fix known as Domestic Annette on airway 1310, which is a cross bearing of radio beams from two low frequency stations located on Annette Island, Alaska, and Sandspit Island, British Columbia. Static interference at times makes it difficult to obtain a fix because of the low frequency radio beams of the two stations. Bearings may vary widely in that area. A radar fix is difficult to obtain in this area going northwest. Flight 293 was flying northwest.

12. Flight 293 departed McChord Air Force Base at 8:32 A.M. on June 3, 1963, without contact with McMechan since about 6:30 to 6:45 A.M.

13. Flight 293 was cruising at 14,000 feet over Domestic Annette when at 1806 Greenwich or 11:06 A.M. on June 3, 1963, it was heard over radio to request permission to climb to 18,000 feet. No reason was given for this request. The last radio report from Flight 293 was at 1807 Greenwich median time or 11:07 A.M. on June 3, 1963.

14. On June 3, 1963, Pacific Northern Airlines Flight No. 5 a Constellation aircraft, was enroute from Seattle, Washington to Anchorage, Alaska; in the area of the Domestic Annette fix, Pacific Northern Airlines Flight No. 5 was cruising at 16,000 feet, and at 17.13Z (10:30 A.M.) obtained a clearance to 18,000 feet. In the area of the Domestic Annette fix, the captain of the Pacific Northern Airlines Flight No. 5 (David Kellogg) became concerned with the loss of communications with Northwest 293 and requested clearance to 20,000 feet in order to give Northwest Flight 293 adequate room if it were in an emergency condition. Kellogg, after noticing repeated efforts being made to communicate with Northwest Airlines Flight 293 without success, assumed there was a possibility that the Northwest flight had a complete electrical failure and was unable to either communicate or use its navigational radio. The captain of the

Pacific Airlines Flight No. 5 himself attempted to contact Northwest Airlines Flight No. 293, but was unsuccessful. The captain of this flight went to his passengers and asked them to keep a lookout for Northwest Airlines Flight 293. Pacific Northern Airlines Flight No. 5 had changed from 16,000 to 18,000 feet because at 16,000 feet light icing was being encountered. At 16,000 feet it was going through cloud formations and icing and after it reached 18,000 feet it was only intermittently on top of the clouds.

15. The estimated point of impact was 116 nautical miles west-southwest of Annette Island, Alaska, outside airway 1310.

16. At 1935 Greenwich median time or 12:35 P.M., on June 3, 1963, an emergency was declared, and at 0322 Greenwich median time or 8:22 P.M. on June 3, 1963, a Royal Canadian aircraft spotted some debris which was confirmed to be Flight 293. Approximately 1,500 pounds of material salvaged from Flight 293 was brought to Annette. The survival equipment aboard Flight 293 was not used, and some adult life vests recovered were still encased in their plastic containers. When recovered in the salvage, some seat frames were extremely deformed. Many were pushed downward and sideward.

17. No evidence of an in-flight fire or explosion was found. The bodies of none of the 101 people aboard were ever recovered. There were no known missile firings in the immediate area of the accident and no other aircraft, other than the Pacific Northern Airlines Flight 5, was known to be in the area at the time of the accident in question.

18. The captain of the flight was Albert Olson. He had been flying cargo planes primarily during the six-month period prior to June 3, 1963. His airman's certificate had a limitation that "holder shall possess corrective glasses for near vision when exercising the privileges of his airman's certificate."

19. That as a result of the occurrence Randall S. Cox met his death. The instrumentality which produced the

death of Randall S. Cox was under the exclusive control and management of the respondent and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and, further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; that the facts herein justify a finding of negligence.

20. Decedent was born April 14, 1934. He left surviving him his wife, Nancy, born November 9, 1934, and two children, Brian, born August 10, 1959, and Alyssa, born June 13, 1962, all of whom were dependent upon him. At the time of his death on June 3, 1963, decedent was 29.14 years of age and had a life expectancy of 41.8 years, and the expectation of his wife and his children exceeded his.

21. Decedent was a career officer in the United States Army and had attained the rank of Captain. He was a competent and ambitious officer, highly commended by his commanding officer.

22. At the time of his death, decedent's monthly pay and allowances were $617.93. His pay for the period from June 3, 1963, to June 1, 1966, allowing for the effective rates which have taken place during that period, would be $26,635.34. He would, in the usual course of events in peacetime, have progressed to Major, then to Lieutenant Colonel, and then to Colonel, becoming a Major in August, 1967, a Lieutenant Colonel in 1972, and a Colonel in 1978; since the Vietnam situation, these promotion periods have been accelerated.

23. The present value, as of June 1, 1966, of the total sums, assuming there were no increases in compensation after July 1, 1966 to September 1, 1986, discounted at 4%, would be $187,622.37. Each year the President is required to review the adequacy of the pay and allowances for members of the Armed Forces, and once each four years, commencing no later than January 1, 1967, must direct a complete review of the concepts of the compensation system for members of the Armed Forces. (Chapter 37, U.S.C., §1008). On July 12, 1966, the Con-

gress of the United States passed an Act which is now awaiting Presidential signature, increasing the monthly base pay for members of the Armed Forces, including Captains, Majors, Lieutenant Colonels and Colonels, in excess of 3%.

24. On September 1, 1986, decedent would have retired at three-quarters of his regular pay and allowances. That sum is now $912.38. It is to be adjusted to reflect changes in Consumer Price Index, and increases in Consumer Price Index of at least 3% over the base index for three consecutive calendar months, as determined by the Secretary of Defense, will result in an adjustment in increase in retired payment by the highest per centum of increase said increase to be effective the first day of the third calendar month and to be according to the highest per centum of increase in the index during those three months, adjusted to the nearest 1/10th of one per centum. (Chapter 37, U.S.C., §1410).

25. The present value as of June 1, 1966, of the present retirement pay of $912.38 per month, from September 1, 1986, to April 1, 2005, discounted at 4%, is $65,182.08.

26. Decedent, a man of industry and sobriety, would not have incurred more than 20% of his income as personal expenses prior to his retirement in 1986, when he was raising and educating two minor children. Deducting 20% from $187,622.37 (discounted at 4%), leaves $150,097.90 loss of contribution to the widow and children during their minority.

27. Decedent was a healthy, ambitious man, who graduated from college with good grades, majoring in Economics. There is a demand in industry for persons of his capabilities and training in management and administrative work. Decedent would have pursued a second career at the age of 52, on retirement from the Armed Forces, and would have earned approximately $10,000 per year in addition to his pension for a period of thirteen years. Discounted at 4%, the sum of $10,000

per year for thirteen years, commencing in 1986, would now have a present value of $46,100.

28. Decedent, subsequent to his retirement in 1986, would not incur more than 35% of his income from the pension of $912.38 monthly. The present value of this sum, when discounted at 4%, is $65,182.08, and allowing 35% for living expenses of the decedent, after he had reached the age of 52, would be $22,813.73, leaving a loss of contributions from the pension in the sum of $42,368.35. Of his earnings of $10,000 a year for thirteen years, commencing at the age of 52 and discounted at 4%, would be $46,100. Subtracting 35% for his personal expenses during this period would leave $29,965. The total combined income from the pension and from the salary, discounted at 4%, is $111,282.08, and the total loss of contributions, after having deducted 35% for the decedent's personal expenses during this period, leaves a loss of contributions of $72,333.35.

29. Decedent was a man of industry and sobriety, and in the natural course of events he would have accumulated some estate. According to the expectation tables, his wife would survive him and be the natural object of his bounty. The Court fixes the value of his estate at $30,000.

30. Decedent's two children have been deprived of the care, training, guidance and education to which they would be entitled had be survived. In the case of Brian, almost four years of age at the time of his death, this would be 17 years. In the case of Alyssa, less than one year old at the time of his death, this would be 20 years. The Court fixes this loss at $1,500 per annum in each case, which amounts to the sum of $4,500 for each child to June 1, 1966.

For Brian, who will reach the age of majority in 1980, the sum of $1,500 per annum from June 1, 1966, discounted at 4%, is $16,345.00.

For Alyssa, who will reach the age of majority in 1983, the sum of $1,500 per annum from June 1, 1966, discounted at 4%, is $18,644.00.

31. The decedent rendered services to the household, and the fair value of these to his wife would be $600 per annum over his expectancy of 41.8 years. Discounted at 4%, this sum would amount to $12,301.00.

The Court, on the basis of a 4% discount rate, enters judgment against the Respondent in the sum of $329,956.59.

This sum is arrived at as follows:

Loss of income from 6/3/63 to 6/1/66 is $26,635.34. Allowing $1,800 per year for decedent's personal expenses, or a sum of $5,400, we have $21,235.34. This does not include interest on lost wages, to which Libellant would be entitled. (National Airlines, Inc. v. Stiles, 268 F.2d 400)	$	21,235.34
Loss of future contributions while in active service before retiring at age 52 is arrived at by considering $187,622.37 (the total earnings reduced at 4%) and the loss of contributions for decedent's personal expenses being computed at 20%, which leaves $150,097.90		150,097.90
The present value of his pension, discounted at 4%, is $65,182.08, and the present value of $10,000 a year (for sums earned after retiring at age 52) for 13 years now discounted at 4% is $46,100, leaving a total of combined income of $111,282.08, which, reduced by 35% for the decedent's personal expenses, leaves a loss of contributions of $72,333.35		72,333.35
Loss of care, education and guidance:		
To Brian Cox ($1,500 per year until age 21)		20,845.00
To Alyssa Cox ($1,500 per year until age 21)		23,144.00

Loss of inheritance to Nancy Cox, widow	30,000.00
Loss of services to widow	12,301.00

Entered this 4th day of August, A. D. 1966.

/s/ Igoe
Judge of the United States
District Court for the Northern
District of Illinois

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter because of the provisions of the Death on the High Seas Act. (46 U.S.C., Par 761)

2. Decedent lost his life on June 3, 1963, when he was a passenger on respondent, Northwest Airlines, Inc.'s Flight No. 293, en route from McChord Air Force Base, Washington, to Elmendorf Air Force Base, Alaska; said Flight crashed into the ocean approximately 116 nautical miles west-southwest of Annette Island, Alaska, as the result of the negligence of the respondent. The negligence of respondent was the proximate cause of decedent's death, and decedent himself was not guilty of contributory negligence.

3. I. Irene Cox, duly appointed Administrator of Randall S. Cox, deceased, is awarded the sum of $329,956.59, said sum to be allocated in accordance with the Findings of Fact herein.

Entered this 4th day of August, A. D. 1966.

/s/ Igoe
Judge of the United States
District Court for the Northern
District of Illinois

SUPREME COURT, U. S.

FILED

DEC 22 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 853

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Petitioner,

vs.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,
Attorney for Respondent
in No. 853.

SUPREME COURT PRINTING CO., INC., 115 E. 40TH STREET, NEW YORK, N.Y. 10016

INDEX

	PAGE
Prefatory Note	1
Questions Presented	2
Statement Of The Case	3
Reasons For Denial Of The Petition	7
Conclusion	14

List Of Authorities Cited

Arrow Aviation, Inc. v. Moore, 8 Cir., 266 F. 2d 488 (1959) 9

Ayres Marine Service v. W. Horace Williams Co., 5 Cir., 213 F. 2d 27 (1954) 13

Blumenthal v. United States, 3 Cir., 306 F. 2d 16, 19 ..... 10, 11

Citrola v. Eastern Air Lines, Inc., 2 Cir., 264 F. 2d 815, 818 11

Eastern Air Lines, Inc. v. Silber, 5 Cir., 324 F. 2d 38 (1963) 9

Guzman v. Pichirilo, 369 U.S. 698, 702 7

Haasman v. Pacific Alaska Air Express, 100 F. Supp. 1 (D.C. Alaska, 1951), aff'd sub nom., DesMarias v. Beckman, 9 Cir., 198 F. 2d 550 (1952), cert. den., 344 U.S. 922 10

Johnson v. United States, 333 U.S. 46 (1948) 9, 12

Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340 (1944) 9

Lobel v. American Airlines, 2 Cir., 192 F. 2d 217, cert. den., 342 U.S. 945 11

Logan Charter Service, Inc. v. Cargill, Inc., 8 Cir., 373 F. 2d 54 (1967) 13

Magnolia Petroleum Co. v. Tug Jared, 216 F. Supp. 322 (E.D. La. 1963) 14

Russell Polling & Co. v. Tug Alice M. Moran, 205 F. Supp. 874 (S.D.N.Y. 1962) 13

Smith v. Pacific Alaska Airways, Inc., 9 Cir., 89 F. 2d 253 (1937) 11

Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940 (D.C. D.C. 1948), 6 A.L.R. 2d 521 9

Sweeney v. Erving, 228 U.S. 233 (1938) 12

Trihey v. Transocean Air Lines, 9 Cir., 255 F. 2d 824, 828-829 10

In The

Supreme Court of the United States

October Term, 1967

No. 853

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Petitioner,

vs.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PREFATORY NOTE.

Petitioner, Northwest Airlines, Inc., does not set forth any jurisdictional grounds upon which its petition is based. Rather, it simply states that it is based upon 28 USC § 1254(1). Nowhere is this Court's Rule 19 referred to nor are any of the reasons stated therein urged as a basis of jurisdiction.

Actually, the essence of the petition is that the district judge should have arrived at a different conclusion on the basis of the evidence in the case.

QUESTIONS PRESENTED.

More properly stated, they are:

1. Should this Court interfere with findings of fact, supported by evidence and approved by a Court of Appeals?

2. Should this Court deviate from the doctrine of *res ipsa loquitur*, as announced in many cases, including *Sweeney* v. *Erving*, 228 U.S. 233, and *Johnson* v. *United States*, 333 U.S. 46?

STATEMENT OF THE CASE.

Petitioner's sketchy factual statement requires an addendum.

Petitioner, Northwest Airlines, had an agreement with the Military Air Transport Service to fly personnel to and from various Air Force bases. (App. 25)[1] The flight in which libellant's decedent was killed (flight 293), was scheduled to fly from McChord Air Force base, Washington to Elmendorf Air Force base in Alaska. (App. 25)

The Area Over Which The Flight Was Planned.

This flight would pass over a fix known as Domestic Annette on an airway known as airway 1310. This is a position reporting point from bearings taken from two low-frequency radio stations, one located on Sand Spit Island, British Columbia, the other on Annette Island, Alaska. (App. 47) It is difficult to make a fix in this area, for two reasons: (a) precipitation, and (b) problems inherent in a low-frequency station. (App. 37, 38)

Low-frequency stations have for years been known to be a source of difficulty in determining one's position. (App. 37, 38, 47, 65) It is for this reason that they have been replaced by OMNI stations. (App. 37, 38) When one is going northwest over this particular route it is particularly difficult to ascertain one's position. (App. 38, 39)

---

[1] "App." refers to the printed appendix filed in the Court of Appeals and in this Court, "A. App." to the additional appendix and "A." to the appendix attached to the petition filed herein.

The weather phenomenon encountered in the Sand Spit to Domestic Sitka[2] portion of this flight was occasional heavy precipitation static while in the clouds and it reached its worst point in the vicinity of Domestic Annette. (App. 42)

Air-borne radar was in use in the Domestic Annette area at this time. (App. 48) It paints a very limited and poor picture to any operation south of that area. (App. 28) The two radio facilities are the primary means of establishing a position over Domestic Annette, since weather radar may not show ground objects clearly when there is a great deal of cloud cover. (App. 68)

The Flight Plan Altitude.

Flight 293 departed McChord at 8:33 A.M. (App. 26; A. App. 5) Its flight plan called for it to fly at 14,000 feet. (Resp. Ex. 8, App. 139)

The weather forecast was light rime icing[3] becoming frequently moderate to heavy rime icing after 1800 or 10:00 A.M. (App. 51) Prior to the departure of flight 293, Ramsay, the weather forecaster at McChord Air Base told the pilot before he took off of icing at 14,000 feet, but received no comment. He even read the flight plan to the captain and in so doing noted that he would

---

[2] Domestic Annette is between Sand Spit Island and Domestic Sitka. (App. 57) Domestic Sitka was another place where one's position could be ascertained. (App. 40)

[3] Rime ice is a type of ice that accretes on the aircraft while it is in the air and can affect the aircraft in several ways. Two of the ways are that it adds weight to the aircraft and can spoil the lifting efficiency of the wings. (App. 74) It can be hazardous. (App. 81)

be flying at 14,000 feet and asked him if that was all correct. The pilot's response was, "You have it correct." (App. 57)

As Ramsay said, "We can inform the pilot of where the icing is, and if he wants to take off a flight through severe icing that is his problem as long as we have it down on his clearance. I had given this pilot on the brief light to moderate rime icing up to 14,000 feet. That would be in the area between Sand Spit and Domestic Sitka." Domestic Annette is, of course, in between those points. Ramsay would have recommended 15,000 or 16,000 feet, or above 15,000. (App. 57)

It is, of course, fundamental that rime ice can be a hazard. (App. 81)

The initial flight plan of Pacific Northern Airlines Flight No. 5, which was to fly in the same area about the same time as Flight 293, called for an altitude of 16,000 feet. Captain William D. Kellogg, its pilot, had received the weather forecast on 14,000 but then planned his flight for 16,000. (App. 39, 40, 42)

When the Pacific Northern Airlines Flight No. 5 was cruising at 16,000 feet, it obtained a clearance to go to 18,000 feet at 10:30 A.M. because of icing conditions. (App. 40, 43) It was then in the area of the Domestic Annette fix. (App. 167, 168) After reaching 18,000 feet, it was only intermittently on top of the clouds. (App. 41)

Meanwhile, Kellogg became concerned with the loss of communications with 293 and asked clearance to 20,000 feet to give 293 adequate room in the event of an emergency. (App. 40) Kellogg made repeated efforts to communicate with 293, and assumed there was a possibility

that it had a complete electrical failure and was unable to either communicate or use its navigational radio. (A. App. 1) He asked his passengers to keep a lookout for flight 293. (A. App. 2)

The ill-fated flight 293 was cruising at 14,000 feet when at 11:06 A.M. it requested permission over the radio to climb to 18,000 feet. No reason was assigned for the request. It was last heard from at 11:07 A.M., June 3, 1963. (App. 28, 29)

At 12:35 P.M. an emergency was declared and at 8:22 P.M. that evening a Royal Canadian aircraft noticed debris, which was confirmed to be flight 293.

There was no evidence of an in-flight fire or explosion, nor were there any missile firings in the area of the accident. The only other aircraft in the vicinity was Pacific Northern Airlines flight 5. (App. 29) The estimated point of impact between flight 293 and the water was 116 nautical miles west-southwest of Annette Island, Alaska, outside airway 1310. (App. 65, 76)

There was no explanation of the cause of this crash in the ocean.

REASONS FOR DENIAL OF THE PETITION.

Prefatory Statement.

Petitioner Northwest Airlines does not urge the findings of fact made by the district court and affirmed by the Court of Appeals are erroneous. This Court has held in admiralty cases, that no reviewing court can interfere with a finding of fact unless it "is left with the definite and firm conviction that a mistake has been committed." *Guzman* v. *Pichirilo*, 369 U.S. 698, 702.

It is also clear that petitioner, in the Court of Appeals and in this Court, admits the application of the doctrine of res ipsa loquitur in airplane crash cases, but argues it should not be applied here, although this is a situation where the party who had exclusive control of the instrumentality has failed to explain why its aircraft plunged into the ocean.

Petitioner now argues that "libellant's only probative evidence demonstrated that an accident happened. Nothing more."

Petitioner omits these facts and findings:

1. There was an advance warning that there would be rime icing *up* to 14,000 feet in the Domestic Annette area becoming heavy after 10 A.M.

2. Notwithstanding the warning of the weatherman, the Captain for no explained reason insisted on flying at 14,000 feet.

3. When the craft was in the area where the icing was predicted to be worst, it sought clearance to

18,000 feet and was heard from for the last time at 11:07, 67 minutes after the time the forecaster predicted the heavy rime icing.

4. The pilot of another craft was informed as to the weather at 14,000 feet, but nonetheless selected 16,000 feet as his initial flight plan. Indeed, he was cleared to 18,000 feet before he became aware of the problems of flight 293. (App. 40, A. 11, 12, 13)

The district court found:

"The instrumentality which produced the death of Randall S. Cox was under the exclusive control and management of the respondent and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and, further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; that the facts herein justify a finding of negligence." (App. 169, A. 13, 14)

This, of course, is a classic statement of the doctrine of *res ipsa loquitur*.

IT IS WELL ESTABLISHED THAT WHERE AN AIRCRAFT IS UNDER THE EXCLUSIVE MANAGEMENT AND CONTROL OF PETITIONER AND SAID AIRCRAFT CRASHES, THE ABSENCE OF ANY EVIDENCE BY THE OPERATING COMPANY EXPLAINING THE CAUSE OF THE OCCURRENCE JUSTIFIES THE APPLICATION OF THE DOCTRINE OF RES IPSA LOQUITUR.

Petitioner misconceives the doctrine of *res ipsa loquitur* when it urges that without evidence of specific negligence or of an unusual circumstance, the doctrine of *res ipsa loquitur* cannot satisfy libellant's duty to sustain her burden of proof.

What are the undisputed facts? Aside from the facts concerning where it was flown, the area, and the altitude, which we have set out, it is uncontradicted:

1. That libellant's decedent was a passenger for hire on petitioner's plane.

2. That petitioner had exclusive control and operation of the plane.

3. That this plane, equipped with a crew of six and carrying ninety-five passengers, crashed into the Pacific about 116 miles from Annette Island, Alaska.

4. That there was no evidence of either an in-flight fire or explosion and there were no missiles being discharged in the area.

5. That the cause of the occurrence was never shown, although it was such as does not take place in the careful operation of an air line.

The doctrine of *res ipsa loquitur* has been held to be peculiarly suitable in actions against common carriers for accidents involving airplanes because of the high degree of care required. *Smith* v. *Pennsylvania Central Airlines Corp.*, 76 F. Supp. 940 (D.C. D.C. 1948), 6 A.L.R. 2d 521. Of course, petitioner, as a common carrier by air, owed libellant's decedent the highest degree of care consistent with the practical operation of its business. *Eastern Air Lines, Inc.* v. *Silber*, 5 Cir., 324 F. 2d 38 (1963); *Arrow Aviation, Inc.* v. *Moore*, 8 Cir., 266 F. 2d 488 (1959); *Kamienski* v. *Bluebird Air Service, Inc.*, 321 Ill. App. 340 (1944).

The classic *res ipsa loquitur* case is *Johnson* v. *United States*, 333 U.S. 46. There the plaintiff was injured when,

with a fellow employee, he was on the deck of a vessel rounding in two blocks, an operation which followed the cradling of the boom. A block that was to be held by Dudder, a fellow employee, was permitted to fall and hit plaintiff while he was bending over coiling some accumulated free line. "It is not certain why the block fell." (P. 48) This court held the rule of *res ipsa loquitur* was properly invoked to afford the plaintiff a recovery.

Nor is the doctrine in any wise diluted because the action is brought under the Death on the High Seas Act on the admiralty side of the court. *Blumenthal* v. *United States,* 3 Cir., 306 F. 2d 16, was an action for the wrongful death of a civilian lost after bailing out of a disabled military aircraft over international waters between Korea and Japan. There was no precise evidence as to the cause of the accident. Recovery was allowed under this doctrine.

In *Haasman* v. *Pacific Alaska Air Express,* 100 F. Supp. 1 (D.C. Alaska, 1951), aff'd *sub nom., DesMarias* v. *Beckman,* 9 Cir., 198 F. 2d 550 (1952), cert. den., 344 U.S. 922, defendant's plane disappeared without a trace on a flight from Alaska to Seattle. There was no icing or unusual weather conditions along the route. Plaintiff relied solely upon the doctrine of *res ipsa loquitur.* Defendant urged that since the plane was never found, it had no knowledge of probable cause superior to that of the plaintiff's. This argument was specifically rejected by the Court of Appeals when it approved the District Court opinion in full which found for the plaintiff.

The language of the *Haasman* case received the complete approval of the court in *Trihey* v. *Transocean Air Lines,* 9 Cir., 255 F. 2d 824, 828-829.

In *Smith* v. *Pacific Alaska Airways, Inc.*, 9 Cir., 89 F. 2d 253 (1937), an action to recover damages for death of an airplane passenger, the plaintiff merely proved that the airplane crashed and then rested. This was held adequate for submission on the doctrine of *res ipsa loquitur*.

Citrola v. *Eastern Air Lines, Inc.*, 2 Cir., 264 F. 2d 815 involved a plane crashing while attempting to land at an airport.

Lobel v. *American Airlines*, 2 Cir., 192 F. 2d 217, cert. den., 342 U.S. 945, was an action for injuries in an air crash in Indiana. The court held it was not error to submit the case to the jury on *res ipsa loquitur*.

Once the doctrine of *res ipsa loquitur* is applicable, then, of course, petitioner's negligence is a matter to be determined by the trier of the facts. (*Citrola* v. *Eastern Air Lines, Inc.*, 2 Cir., 264 F. 2d 815, 818; *Blumenthal* v. *United States*, 3 Cir., 306 F. 2d 16, 19)

Libellant's *prima facie* case remained uncontradicted. Petitioner, upon whom then rested the burden of explaining this unusual occurrence, produced no evidence whatsoever as to its cause.

Outside the weather, the only other two possible factors are the condition of the plane and the conduct of the crew.

Petitioner urges that the plane was in excellent condition and that it made a showing of due care. Yet the craft was under its control, through the conduct of its employees. What the crew did or failed to do remained unexplained, although we know it deliberately flew at an altitude and chose a course where heavy icing was forecast. It undertook to accomplish the flight under dangerous circumstances.

Petitioner's Authorities.

Petitioner seeks to argue around *Johnson* v. *United States*, 333 U.S. 46 (1948), which was cited to the Court of Appeals.

Petitioner states the Court below "seemingly believed" that this Court's opinions regarding *res ipsa loquitur* required a full explanation of the cause of an accident. Of course, the very purpose of the doctrine is to obviate proof of specific cause when such is impossible. It seeks to distinguish *Johnson* because it was a Jones Act case and therefore, it says, the rule was unique in that owners of ships owe a duty to their employees higher than that of other defendants.

Such is incorrect.

The fundamental fact is that petitioner, as a common carrier, owed the highest degree of care to the libellant's decedent. And in airplane crashes, it is manifest that the owner of the airplane possesses knowledge superior to that of a passenger concerning circumstances involving the operation of its planes. Indeed, what more helpless situation can be imagined than that of an airplane passenger? Moreover, it is a well recognized proposition of law that an unexplained crash of an airplane comes within the ambit of the *res ipsa loquitur* doctrine.

Petitioner then alleges that the Court of Appeals misinterpreted *Sweeney* v. *Erving*, 228 U.S. 233 (1938), stating that it reasoned that a finding of negligence was "required" by *Sweeney*. Of course this is not true. The Court of Appeals said that the district court "properly applied the doctrine of *res ipsa loquitur* and that its

finding of negligence was a permissible one—warranted though not compelled * * *". (A. 4)

Ayres Marine Service v. *W. Horace Williams Co.*, 5 Cir., 213 F. 2d 27 (1954), is referred to and described a case which "conflicts in principle" with this decision.

A cursory examination of that case discloses the decree for the libellant was predicated upon specific negligence. In an affirming opinion, the Court of Appeals simply noted the district court's decision was not based on *res ipsa loquitur*. This was made very clear in the recent case of *Logan Charter Service, Inc.* v. *Cargill, Inc.*, 8 Cir., 373 F. 2d 54 (1967), where in a libel in admiralty against the owner of a tug, the Court said, at 60:

> "Appellant complains of the court's statement that the doctrine of *res ipsa loquitur* was applicable to the instant case. As a general proposition, this doctrine is applicable to admiralty cases. In the instant case, the trial court attributed liability solely to the specific negligence of the crew of the City Of Joliet. The court's conclusion was not based on the doctrine of *res ipsa loquitur*. And in this aspect, the case is analogous to *Ayres Marine Service* v. *W. Horace Williams Co.*, 213 F. 2d 27, 30 (5th Cir., 1954), where the court there properly, we think, rejected a similar contention as appellant here advances."

The only other case relied upon by petitioner is *Russell Polling & Co.* v. *Tug Alice M. Moran*, 205 F. Supp. 874 (S.D.N.Y. 1962). That was a libel in admiralty action for damages to a barge being towed by the tug. The damage to the tug was noted after the tow was ended. It was unknown whether the damage occurred during the tow or from other causes. The Court held *res ipsa loquitur* could not be used as a basis for the presumption that the damage

occurred during this particular tow. This is a universal rule in similar cases. See *Magnolia Petroleum Co.* v. *Tug Jared*, 216 F. Supp. 322 (E.D. La. 1963).

CONCLUSION.

This petition raises no question to justify granting the writ of certiorari. Petitioner merely urges that the Court, on the evidence before him, should have rendered a different result.

We respectfully submit that this petition be denied.

Respectfully submitted,

JAMES A. DOOLEY,
111 W. Washington Street,
Chicago, Illinois 60602,

Attorney for Respondent in No. 853.